No. 88-457

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In The

Supreme Court of the United States

OCTOBER TERM, 1988

GILBERT NELSON and
GEORGE SHAMY,

Petitioners,

-vs-

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit.

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

1. Did the Court of Appeals err by declining to reverse petitioners' convictions of Count 4, the conspiracy to obstruct justice count, because of prejudicial spillover and taint from the subsequently dismissed or reversed Hobbs Act, mail fraud, and obstruction of justice counts?

a. Whether the the Court of Appeals' decision upholding the judgment of the trial court departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision?

b. Whether the court of Appeals' endorsement of the trial court's failure to grant the Rule 29 motions for judgment of acquittal on Counts 2 and 3 of the Indictment, the Hobbs Act counts, at the close of the Government's case as harmless error, prejudiced Nelson and Shamy's right to a fair trial in direct violation of the principles set forth in *Tibbs v. Florida*, 457 U.S. 31 (1982)?

2. Did the court below err by declining to grant petitioners a new trial on the conspiracy to obstruct justice count based on the variance between the Indictment and the proof at trial?

3. Did the court below err in upholding the validity of the conspiracy to obstruct charges in Count Four on the basis of *United States v. Perlstein*, 126 F.2d 789 (3d Cir.), *cert. denied*, 316 U.S. 678 (1942), giving rise to a question of importance not heretofore considered by this Court, and one over which the Circuits are divided?

4. Did the court below err by declining to grant Petitioners a new trial on Count 4, conspiracy to obstruct justice, in that Petitioners were not afforded a fundamentally fair trial under the totality of the circumstances?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

FEDERAL STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 12

POINT I: The Court Below Erred by Declining to Reverse Petitioners' Convictions of Count 4, the Conspiracy to Obstruct Justice Count, Because of Prejudicial Spillover and Taint from the Subsequently Dismissed or Reversed Hobbs Act, Mail Fraud, and Obstruction of Justice Counts 12

A. The Court of Appeals' Decision Upholding the Judgment of the Trial Court Departed from the Accepted and Usual Course of Judicial Proceed-

ings as to Call for an Exercise of this Court's Power of Supervision 13

B. The Trial Court's Failure to Grant the Rule 29 Motion for Judgment of Acquittal on Counts 2 and 3 of the Indictment, the Hobbs Act Counts, at the Close of the Government's Case, Prejudiced Nelson and Shamy's Right to a Fair Trial 17

POINT II: The Court Below Erred by Declining to Grant Petitioners a New Trial on Conspiracy to Obstruct Justice, Based Upon a Variance Between the Indictment and the Proof at Trial of the Petitioners 20

POINT III: The Court Below Erred in Upholding the Validity of the Conspiracy Charged in Count 4 on the Basis of *United States v. Perlstein* 27

POINT IV: The Court Below Erred by Declining to Grant Petitioners a New Trial on Count 4, Conspiracy to Obstruct Justice, in that Nelson and Shamy Were Not Afforded a Fundamentally Fair Trial Under the Totality of the Circumstances 29

CONCLUSION 30

TABLE OF AUTHORITIES

Cases Cited

Baker v. United States, 329 F.2d 786 (10th Cir. 1964), *cert. denied,* 379 U.S. 853 (1965) 13

Berger v. United States, 295 U.S. 78 (1935) 23

Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964) 19

Kotteakos v. United States, 328 U.S. 750 (1946) 23, 24, 26

Krulewitch v. United States, 336 U.S. 440 (1948) 17

McNally v. United States, __ U.S. __, 107 S. Ct. 2875 (1987) 5, 29

Pettibone v. United States, 148 U.S. 197 (1893) 27, 28

Tibbs v. Florida, 457 U.S. 31 (1982) 20

United States v. Boscia, 573 F.2d 827 (3d Cir.), *cert. denied,* 436 U.S. 911 (1978) 14

United States v. Boyd, 595 F.2d 120 (3d Cir. 1978) 14

United States v. Branker, 395 F.2d 881 (2d Cir. 1968), *cert. denied,* 393 U.S. 1029 (1969) 17

United States v. Camiel, 689 F.2d 31 (3d Cir. 1982) 23

United States v. Cianciulli, 476 F. Supp. 845 (E.D. Pa. 1979) 17

United States v. Cryan, 490 F. Supp. 1234 (D.N.J. 1980), *aff'd,* 636 F.2d 1211 (1981) 26, 27

United States v. Dansker, 537 F.2d 40 (3d Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977) 14

United States v. Davis, 578 F.2d 277 (10th Cir. 1978) 15

United States v. DeLaRosa, 450 F.2d 1057 (3d Cir. 1971), *cert. denied,* 405 U.S. 927 (1972) 14

United States v. DeMatteo, 169 F.2d 798 (3d Cir. 1948) 12

United States v. Giampa, 758 F.2d 928 (3d Cir. 1985) 18, 19

United States v. Guilliano, 644 F.2d 85 (2d Cir. 1981) 15

United States v. House, 551 F.2d 756 (8th Cir. 1977) 18

United States v. Johnson, 334 F. Supp. 982 (W.D. Mo. 1971), *aff'd,* 462 F.2d 608 (8th Cir. 1972) 15

United States v. Karbaby, 672 F.2d 857 (11th Cir. 1982) 16

United States v. Kenny, 462 F.2d 1205 (3d Cir.), *cert. denied,* 409 U.S. 914 (1972) 26

United States v. Lewis, 626 F.2d 940 (D.C. Cir. 1980) 19

United States v. Maker, 751 F.2d 614 (3d Cir. 1984)..... 23,24

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977)..... 19

United States v. McComb, 744 F.2d 555 (7th Cir. 1984)..... 28

United States v. Newman, 490 F.2d 139 (3d Cir. 1974).... 30

United States v. Perlstein, 126 F.2d 789 (3d Cir.), *cert. denied*, 316 U.S. 678 (1942)..... 27, 28

United States v. Rhodes, 631 F.2d 43 (5th Cir. 1980) 18

United States v. Robinson, 504 F.2d 301 (2d Cir. 1976)... 30

United States v. Rogers, 636 F. Supp. 237 (D. Colo. 1986)..... 28

United States v. Schurr, 775 F.2d 549 (3d Cir. 1984)..... 23, 24

United States Statutes, Authorities, and Rules Cited

U.S. Const., Amend. VI 2

18 U.S.C. § 371 ..... 2, 5

18 U.S.C. § 1503 ..... 4, 5

18 U.S.C. § 1951 ..... 3, 5

18 U.S.C. § 3231 5

Federal R. Crim. P. 14 13

Federal R. Crim. P. 29 ..... 17, 18, 19, 29

Appendices

APPENDIX A: Opinion of the United States Court of Appeals for the Third Circuit, Dated July 26, 1988 ..... 1A

APPENDIX B: Opinion of the United States District Court for the District of New Jersey, Dated August 3, 1987, Granting Petitioners' Post-Trial Motions Re: Counts 2 and 3 ..... 25A

APPENDIX C: District Court Jury Instructions and Charge 44A

APPENDIX D: Order of the United States District Court for the District of New Jersey, Dated August 3, 1987, Granting Petitioner Gilbert Nelson's Motion for Dismissal of Counts 2 and 3 ..... 91A

IN THE
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OCTOBER TERM, 1988
NO. _____

GILBERT NELSON
AND GEORGE SHAMY,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Petitioners, Gilbert Nelson and George Shamy, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 26, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit in this case was filed on July 26, 1988, under Docket Nos. 87-5529 and 87-5561. Citations to the official reporter are not yet available. The opinion issued by the Honorable Maryanne Trump Barry, United States District Court for the District of New Jersey, was filed on August 3, 1987 in Criminal Action No. 87-41, and was marked "not for publication." The opinions, judgments, and orders are reproduced as Appendices A, B, and D.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on July 26, 1988. There was no petition for a rehearing filed in this matter. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED

The United States Constitution, Amendment VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18, Section 371 of the United States Code provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined nor more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only,

the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, Section 1951 of the United States Code provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section —

1. The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

2. The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

3. The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or

the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Title 18, Section 1503 of the United States Code provides:

> Whoever corruptly, or by threats of force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

On February 11, 1987, the Grand Jury of the United States District Court for the District of New Jersey returned an Indictment charging Gilbert Nelson with con-

spiracy to commit mail fraud in violation of 18 U.S.C. Section 371 (Count 1), conspiracy to violate the Hobbs Act, in violation of 18 U.S.C. Section 1951 (Count 2), extortion in violation of 18 U.S.C. Sections 1951 and 2 (Count 3), conspiracy to obstruct justice, in violation of 18 U.S.C. Section 371 (Count 4), and two counts of obstruction of justice, in violation of 18 U.S.C. Section 1503 (Counts 5 and 6). The same indictment charged George Shamy with conspiracy to obstruct justice in violation of 18 U.S.C. Section 371 (Count 4), and with obstruction of justice, in violation of 18 U.S.C. Sections 1503 and 2 (Count 5). Charged with Nelson in Counts 1 through 3 were James V. Gassaro and Joseph Perrone. The United States District Court had jurisdiction of the matter pursuant to 18 U.S.C. §3231.

Nelson and Shamy were tried with the other co-defendants before the Honorable Maryanne Trump Barry and a jury on May 26-29, June 1-5, 8-11, 1987. At the close of the Government's case, the court granted defendant Perrone's motion for judgment of acquittal, and reserved judgment on Nelson and Gassaro's motion for judgment of acquittal on Counts 2 and 3, the Hobbs Act Counts. On June 11, 1987, the jury returned a verdict of guilty as to each remaining defendant, on all counts charged. Following the jury's verdict, the trial court granted Nelson and Gassaro's reserved motion for judgment of acquittal with respect to Counts 2 and 3 of the Indictment, the Hobbs Act counts, and dismissed Counts 2 and 3.

On July 27, 1987, following the United States Supreme Court's opinion in *McNally v. United States,* __ U.S. __, 107 S. Ct. 2875 (1987), the trial court granted defendants

Gassaro and Nelson's motion for a new trial on Count 1, the mail fraud count, which was ultimately dismissed on October 29, 1987 and denied the motion as to all other counts. On July 31, 1987, Gilbert Nelson was sentenced to a term of five years and a fine of $10,000 on Count 4, to a term of five years and a fine of $5,000 on Count 5, and to a term of five years and a fine of $5,000 on Count 6. The Court suspended sentence on Counts 5 and 6 and placed Gilbert Nelson on probation for a period of five years on Counts 5 and 6, said probation to commence upon completion of parole on Count 4.

Following the denial of his motion for a new trial on July 27, 1987, George Shamy was sentenced on July 31, 1987 to a term of two years and a fine of $5,000 on Count 4, and to a term of five years and a fine of $5,000 on Count 5, to run consecutive to the term for Count 4. The Court suspended sentence on Count 5 and placed George Shamy on probation for a period of five years on Count 5, said probation to commence upon completion of parole on Count 4.

After final judgment of conviction and sentencing, petitioners appealed to the United States Court of Appeals for the Third Circuit as a matter of right pursuant to 28 U.S.C. § 1291. On July 26, 1988, the Court of Appeals for the Third Circuit entered an Opinion and Judgment reversing petitioners' judgment of conviction as to the substantive obstruction counts (Counts 5 and 6), but affirming the judgment of conviction as to the conspiracy to obstruct (Count 4). By Order dated August 19, 1988, the Court of Appeals stayed the entry of the mandate, provided that the instant Petition for Certiorari was filed by September 15, 1988.

The indictment charged Gilbert Nelson, James V. Gassaro, Joseph Perrone and George Shamy with various crimes arising out of the sale of certain property to the City of New Brunswick. As the trial judge stated in her post-trial opinion, "extensive press coverage, trumpeting charges of 'extortion' followed the arrest and subsequent indictment of Gilbert Nelson, City Attorney for the City of New Brunswick, and James V. Gassaro, Director of Police.".

During the three-week trial, the Government introduced the testimony of nineteen witnesses in its case in chief, and also the testimony of two witnesses in rebuttal. Most of this testimony was relative to, and was introduced to prove, the allegations concerning the Hobbs Act Counts and the mail fraud conspiracy. Testimony concerning the mail fraud count centered upon the purchase of a piece of property by the New Brunswick City Council for the purpose of operating a Central Maintenance Facility for city-owned vehicles. The property was purchased by the City from Richard Malouf, a longtime friend of Nelson and Gassaro. Malouf had purchased the property from the prior owner, pursuant to a contractual right of first refusal, for $260,000, a small portion of which was financed by Gassaro ($20,000) and Perrone ($25,000). Malouf then sold the property to the City for $305,000. The City Council was not informed of Gassaro's or Perrone's interest in the property prior to the sale. Appraisals in the possession of the City Council established a value of $330,000 for the property.

The Government also introduced extensive evidence at trial in an attempt to prove the allegations in the Hobbs Act Counts: that Nelson and Gassaro conspired to extort

from Malouf monies through threatened economic harm, as well as the alternate theory that the extortion was by color of official right. The Government's witness, Richard Malouf, admitted that he offered Gassaro an opportunity to invest in the property because Gassaro was his good friend, and that Malouf did not ask for, nor did Gassaro offer, any assistance from Gassaro in his official capacity as Police Director. Likewise, the testimony of Malouf and other witnesses established that Nelson, as City Attorney, did not push for the purchase by the city, but suggested that Malouf make his own sales pitch to the City Council. As stated by the trial court in the opinion dismissing the Hobbs Act counts, "the government's proofs as arguably relevant to the Hobbs Act counts give new meaning to the word 'meager'."

Testimony concerning the allegations of obstruction of justice and conspiracy to obstruct justice was much less extensive than the Government's case on the Hobbs Act and the mail fraud conspiracy. That testimony established that in March of 1985, the United States Attorney's Office began an investigation into alleged political corruption in New Brunswick. Assistant United States Attorney Tom Weisenbeck caused a Grand Jury subpoena to be issued on March 7, 1985 to the Franklin State Bank, for the bank records of Gilbert Nelson, the City Attorney for the City of New Brunswick. Mr. Weisenbeck also caused to be issued a Grand Jury subpoena to George Shamy, served on April 10, 1985, and a subpoena to Gilbert Nelson, served on April 15, 1985. Mr. Weisenbeck did not schedule any time before the Grand Jury, nor did he present any witnesses before the Grand Jury in this matter prior to his departure from the United States At-

torney's Office in September of 1985. Mr. Weisenbeck had no recollection of seeing any records produced in response to those subpoenas.

The substantive counts of obstruction of justice were founded on the turning over of two documents to Federal authorities: an April 16, 1983, letter from George Shamy to Gilbert Nelson, and a closing statement dated May 5, 1983, prepared by Gilbert Nelson as City Attorney. Richard Malouf testified at trial that on March 26, 1985 the FBI requested a copy of the closing statement from his sale of the property to the City of New Brunswick in May of 1983. Malouf testified that since he did not have a copy of the closing statement, he called his attorney, Ralph Furino, and requested a copy of the closing statement. He also asked Furino to review the figures on the closing statement and to give him the figure representing his net proceeds from the closing. The figure Furino gave him from the closing statement was approximately $96,000; Malouf testified that at the closing he received approximately $91,000. Malouf testified that this conversation with Furino, in March of 1985, was the first time he noticed this discrepancy of $5,000. Yet Catherine Madama testified at trial that Malouf had reviewed the closing figures with Nelson at closing, and that Nelson directed her to write out a check in the amount of approximately $91,000 while Malouf was standing beside him. Furino promised to provide Malouf with a copy of the closing statement immediately.

Shortly after his conversation with Furino, Malouf was contacted by Gilbert Nelson, who asked him for a copy of the original closing statement. Malouf gave the copy of the original closing statement to Gilbert Nelson the fol-

lowing day when he receive it from Furino. Gilbert Nelson returned the closing statement to Richard Malouf on March 26, 1985, and Malouf gave a copy to the FBI on March 29, 1985. At trial, Malouf stated that it had been altered to reflect a $5,000 payment to George Shamy for legal services. Malouf also testified that Gilbert Nelson told him that he had taken out $5,000 for legal fees to George Shamy, and that it was all right to turn the closing statement over to the FBI.

In support of its contention that Gilbert Nelson and George Shamy had conspired to obstruct justice by arranging to have Mr. Shamy falsify a letter to Gilbert Nelson, the Government introduced the testimony of Mrs. Pat Bucey, who had been Mr. Shamy's secretary. Mrs. Bucey was called in an effort to prove that George Shamy had testified falsely in his testimony before the Grand Jury. In that Grand Jury testimony, Shamy stated that while he had been in the Veterans' Hospital in Brecksville, Ohio, he had dictated a personal letter to Gilbert Nelson, which he had signed after his return on April 16, 1983. The letter, typed on Mr. Shamy's stationery, was dated April 16, 1983, and stated that Shamy had just returned from Brecksville, that he had thought about the money he owed to Mr. Nelson, and that he was owed fees by Richard Malouf. The letter further stated that when Malouf closed his transaction with the City of New Brunswick he was going to pay George Shamy the fees due. The letter concluded with a request that Mr. Nelson contact Mr. Shamy when the matter was about to close, and Shamy would arrange to have Malouf authorize Gilbert Nelson to withhold the funds due to Mr. Shamy so that Shamy could pay back Mr. Nelson the money owed to him.

George Shamy had consistently stated, in both his interview with the United States Attorney, Tom Weisenbeck, and in his Grand Jury testimony, that he owed Gilbert Nelson approximately $6,000 from monies borrowed at the race track. He also stated that Richard Malouf owed him approximately $5,000 for fees he had earned for services performed in connection with Malouf's acquisition of the DeAngelis property, which property was subsequently sold to the City of New Brunswick, as well as for other matters.

Mrs. Bucey testified at trial that while George Shamy was in the Veterans' Hospital in Brecksville, Ohio, except for a short period in the beginning, he would call her often to give her instructions and to dictate letters. Mrs. Bucey testified that she could not remember whether she did or did not type the letter. Mrs. Bucey testified that the letter varied from her usual form for typing letters in certain respects, but that in others it was exactly as she would have typed it. Mrs. Bucey also testified that she was almost positive she had worked on April 16, 1983, a Saturday, because she knew Mr. Shamy was coming back and she had a lot of work to get ready for him.

Although Richard Malouf testified at trial that George Shamy had not obtained his authorization for the deduction of the $5,000 from the proceeds of the closing with the City of New Brunswick, he did confirm that he owed Mr. Shamy money for legal services performed, and that Mr. Shamy was very informal in his billing practices.

REASONS FOR GRANTING THE WRIT

I.
THE COURT BELOW ERRED BY DECLINING TO REVERSE PETITIONERS' CONVICTIONS OF COUNT 4, THE CONSPIRACY TO OBSTRUCT JUSTICE COUNT, BECAUSE OF PREJUDICIAL SPILLOVER AND TAINT FROM THE SUBSEQUENTLY DISMISSED OR REVERSED HOBBS ACT, MAIL FRAUD, AND OBSTRUCTION OF JUSTICE COUNTS.

In failing to reverse the conviction on Count 4, the conspiracy count, the Court of Appeals allowed a verdict which was tainted by prejudicial spillover from the other counts to stand. In granting the motion for a judgment of acquittal on Counts 2 and 3, the trial court found that there was insufficient evidence to prove the charges contained in those counts. If it had followed the court's instructions, a reasonable jury should have acquitted defendants Nelson and Gassaro on Counts 2 and 3. It can only be that the jury simply did not understand the evidence and the court's charge, not only on these counts but on the entire case. A defendant on trial is entitled to a jury which at least possesses sufficient understanding of the circumstances of the case to return a pertinent, adequate and coherent verdict. *United States v. DeMatteo,* 169 F.2d 798 (3d Cir. 1948). The jury obviously did not compartmentalize the evidence and did not distinguish between counts on which there was some evidence and those on which there was a complete insufficiency of evidence such that the offense could not have been proven beyond a reasonable doubt. Accordingly, the trial court

erred in failing to set aside the jury's verdict on Counts 4, 5, and 6 due to the unreasonable nature of the verdict on the Hobbs Act Counts and the jury's failure to understand the case.

A. The Court of Appeals' Decision Upholding The Judgment Of The Trial Court Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

Gilbert Nelson and George Shamy joined in a pre-trial motion for severance with their co-defendants. Mr. Shamy requested severance from all his co-defendants. Both Mr. Shamy and Mr. Nelson requested severance of Counts 1, 2, and 3, the mail fraud conspiracy and extortion counts, from Counts 4, 5, and 6, the obstruction of justice counts. The motion for severance was denied by the trial court.

Rule 14 of the Federal Rules of Criminal Procedure provides in pertinent part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Although severance is a form of relief resting with the sound discretion of the trial court, where joinder of defendants causes actual deprivation of a right to a fair trial, severance is no longer discretionary. *Baker v. United States,* 329 F.2d 786 (10th Cir. 1964), *cert. denied,* 379 U.S. 853 (1965). The primary consideration in determining

whether severance is required is whether it is reasonable to expect the jury to compartmentalize the evidence in the case and keep the evidence separate and distinct, so that each defendant receives a fair trial. *See, e.g., United States v. Boyd,* 595 F.2d 120, 125 (3d Cir. 1978); *United States v. Dansker,* 537 F.2d 40, 62 (3d Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977); *United States v. DeLaRosa,* 450 F.2d 1057, 1065 (3d Cir. 1971), *cert. denied,* 405 U.S. 927 (1972). A defendant should not be deprived of a fair trial "because it is easier and more economical for the government to try several defendants in one trial rather than in protracted multiple trials. The goal of the judicial process is not to decide a case as quickly and inexpensively as possible." *United States v. Boscia,* 573 F.2d 827, 833 (3d Cir.), *cert. denied,* 436 U.S. 911 (1978).

The evidence presented at trial clearly demonstrated that joinder of Counts 1, 2, and 3 with Counts 4, 5, and 6 was prejudicial to both Nelson and Shamy. The government introduced the testimony of twenty-one witnesses in order to prove a conspiracy to commit mail fraud, a conspiracy to violate the Hobbs Act, and the substantive charge of extortion under the Hobbs Act. Although all three of these counts were eventually reversed or dismissed, Nelson and Shamy had to sit through a trial in which extensive testimony was admitted in an attempt to prove extortion, conspiracy to commit extortion, and conspiracy to violate the mail fraud statute. Since there were three separate conspiracy counts at trial, the jury was instructed that it could consider acts of co-conspirators against their fellow co-conspirators. It was unreasonable to expect the jury to be able to compartmentalize the evidence in the case in order to keep the evidence separate

and distinct so that each defendant would receive a fair trial. Furthermore, at a severed trial involving just Counts 4, 5 and 6, proofs relating to the remaining Counts 1 through 3 would have been inadmissible, as they were relevant only to separate and distinct conspiracies. There were several instances where the Government produced evidence which could only have been considered on the dismissed or reversed counts and presented theories which were only consistent with extortion. Relief granted after the jury verdict is incapable of obviating the prejudicial effect of the jury's consideration of the evidence concerning the dismissed counts. *United States v. Johnson,* 334 F. Supp. 982 (W.D. Mo. 1971), *affirmed,* 462 F.2d 608 (8th Cir. 1972); *United States v. Davis,* 578 F.2d 277 (10th Cir. 1978). It is naive to believe that a jury can truly appreciate that the evidence presented on the extortion and mail-fraud counts should not color their thinking with regard to the obstruction counts. In fact, as a result of the allegations of mail fraud and extortion going to the jury, the jury was never put to the test of having to separate the evidence as it pertained to the various counts. The Government successfully obtained prosecutorial advantage by overcharging in the Indictment. To uphold the conviction on Count 4 would allow prosecutors to charge heinous crimes without sufficient proof, for the sake of gaining an advantage prosecuting other, more colorable charges.

In this case, there is no question that the mail fraud conspiracy and extortion evidence had a profoundly prejudicial impact on the jury deliberations on the obstruction counts. In *United States v. Guilliano,* 644 F.2d 85 (2d Cir. 1981), the Second Circuit held that the prejudicial effect of tarring a defendant with the label of "racketeer" in

a trial in which the Government was unable to prove the "RICO" count tainted the conviction on an otherwise valid count. In this case, Nelson was convicted on all six counts, but five of those convictions were ultimately held invalid, two of them for insufficiency of the Government's proof; a third because this Court said that "intangible rights" as it applies to mail fraud is no crime at all; and the fourth and fifth because of error on the part of the trial judge.

In *United States v. Karbaby,* 672 F.2d 857, 861 (11th Cir. 1982), the court, quoting from several cases, stated that:

> In determining on appeal whether the jury was in fact confused, the court will look to the verdict. Convictions will invariably be sustained if it may be inferred from the verdict that the jury 'meticulously sifted the evidence, as where it acquits on certain counts.

In this case, the jury's verdict is ample evidence of its inability to meticulously sift the evidence, and its confusion concerning the charges. (The jury verdict was rendered in three hours after a three-week trial.)

The impact of the prejudicial joinder of Counts 1, 2, and 3 with Counts 4, 5, and 6 is even more severe for Mr. Shamy, who was not even named in the first three Counts. The risk of being prejudiced by a great deal of testimony against co-defendants is particularly great for the relatively minor participants who are tried with allegedly more culpable co-defendants. When such minor participants are "charged in only a few of many counts, involved in only a small portion of the evidence, and linked with only one or two of their co-defendants," but the "jury is sub-

jected to weeks of trial dealing with dozens of incidents of criminal misconduct which do not involve these defendants in any way . . . the mounting proof of guilt of one is likely to affect another." *United States v. Branker,* 395 F.2d 881, 888 (2d Cir. 1968), *cert. denied,* 393 U.S. 1029 (1969); *accord, United States v. Cianciulli,* 476 F. Supp. 845 (E.D. Pa. 1979). Although George Shamy was charged with one substantive count of obstruction of justice and with one count of conspiracy to obstruct justice, he sat through a three-week trial involving extensive testimony concerning extortion and mail fraud.

The court below stated that any prejudicial effects or jury confusion was cured by the trial court's instructions to the jury. The verdict on Counts 2 and 3 should suffice to show that the trial court's instructions did not resolve the jury's confusion. In the words of Justice Jackson, "the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States,* 336 U.S. 440, 453 (1948)(Jackson, J., concurring)(citations omitted).

Accordingly, the trial court's failure to grant Nelson and Shamy's motion for severance deprived Nelson and Shamy of their right to a fair trial and was an abuse of discretion.

B. The Trial Court's Failure to Grant the Rule 29 Motion for Judgment of Acquittal on Counts 2 and 3 Of the Indictment, the Hobbs Act Counts, at the Close Of the Government's Case, Prejudiced Nelson and Shamy's Right to a Fair Trial.

At the close of the Government's case, defense counsel for all four co-defendants made motions for judgments of

acquittal pursuant to Rule 29. The trial court granted the motion as to Joseph Perrone on all counts. With respect to defendants Gassaro and Nelson's motion for judgment of acquittal on Counts 2 and 3, the Hobbs Act Counts, the trial court reserved its ruling. After the jury had returned its verdict of guilty on all counts, the trial court dismissed Counts 2 and 3 as to defendants Nelson and Gassaro. The trial court stated specifically that it had reserved on the Rule 29 motions as to Counts 2 and 3 and that "technically, that was an error because Rule 29 required that I decide motions at the end of the government's case." The trial court further stated, "I'm dismissing Counts 2 and 3 as to defendants Nelson and Gassaro or, rather, finally deciding the motion upon which I reserved. The government, of course, has its right to appeal my decision."

The trial court correctly stated the law in observing that Rule 29 requires a ruling on a motion for judgment of acquittal at the close of the government's case. *United States v. Rhodes,* 631 F.2d 43, 44 (5th Cir. 1980); *United States v. House,* 551 F.2d 756, 758 (8th Cir. 1977); *see also United States v. Giampa,* 758 F.2d 928, 934 (3d Cir. 1985). The trial court stated its belief that the government could appeal the judgment of acquittal granted by the court after the verdict. Indeed, in her remarks prior to the argument on the Rule 29 motions, the trial court stated that "I fully understand the importance to the government of letting a case go to the jury, and then if I have to act, I act. Because then if I am wrong, a conviction, if there is a conviction, can be reinstated and there is no double jeopardy problem."

It is clearly the law, however, that the trial court's judgment of acquittal cannot be reviewed on appeal without violating the constitutional prohibition against double jeopardy. *United States v. Giampa, supra,* at 932; *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 571, 97 S. Ct. 1349, 1354, 51 L. Ed. 2d 642 (1977). Thus the trial court's resolution of this case, its entry of a judgment of acquittal based on the insufficiency of evidence on Counts 2 and 3, is not reviewable on appeal. The trial court's attempt to preserve the government's "rights" on appeal to have a conviction reinstated in the event the trial court's ruling was incorrect was not only misguided in its application of the law, it also substantially prejudiced the rights of defendants. If the government's evidence was insufficient in Counts 2 and 3, those counts should not have gone to the jury, and Nelson and Shamy were prejudiced by those counts going to the jury in much the same way that a defendant is prejudiced by joinder of offenses. Where many offenses joined together are considered by a jury, it is possible that the jury may use the evidence of one of the crimes charged to infer criminal disposition on the part of the defendant from which is found his guilt of the crime or crimes charged; or, the jury may cumulate the evidence of the crimes charged and find guilt when, if considered separately, it would not do so. *Drew v. United States,* 331 F.2d 85, 88 (D.C. Cir. 1964); *United States v. Lewis,* 626 F.2d 940, 945 (D.C. Cir. 1980).

In this case, the Hobbs Act counts, with their inflammatory language concerning extortion, were considered by the jury along with the mail fraud conspiracy count and the obstruction counts. The trial court's reserving on its ruling on the Rule 29 motions for judgment of acquittal

with respect to the Hobbs Act counts was an error that clearly prejudiced defendants Nelson's and Shamy's right to a fair trial.

As this Court said in *Tibbs v. Florida*, 457 U.S. 31, 40, 41 (1982):

> *Burks v. United States* and *Greene V. Massey* carved a narrow exception from the understanding that a defendant who successfully appeals a conviction is subject to retrial. In those cases, we held that the Double Jeopardy Clause precludes retrial "once the reviewing court has found the evidence legally insufficient" to support conviction. *Burks*, 437 U.S., at 18; *Greene*, 437 U.S., at 24. This standard, we explained, "means that the government's case was so lacking that it should not have even been *submitted* to the jury." *Burks*, 437 U.S., at 16 (emphasis in original).

II.

THE COURT BELOW ERRED BY DECLINING TO GRANT PETITIONERS A NEW TRIAL ON CONSPIRACY TO OBSTRUCT JUSTICE, BASED UPON A VARIANCE BETWEEN THE INDICTMENT AND THE PROOF AT TRIAL OF THE PETITIONERS.

Count 4 of the Indictment charged Gilbert Nelson and George Shamy with conspiracy to obstruct the due administration of justice. Count 4 specifically charged Gilbert Nelson with causing the closing statement to be altered and producing such altered closing statement to federal law enforcement authorities. Count 4 also alleged that Gilbert Nelson caused the books and records of the City

of New Brunswick to be altered. Count 4 charged George Shamy with fabricating the April 16, 1983 letter and with testifying falsely before the Federal Grand Jury as to when the letter was prepared. Count 4 also set forth seven enumerated overt acts allegedly in furtherance of the conspiracy to obstruct justice. The first paragraph of Count 4 states as follows:

> Paragraphs 1 through 16, inclusive, of Count 1 are realleged and incorporated as though fully set forth herein.

Count 1 of the Indictment sets forth the allegations concerning the conspiracy to commit mail fraud charged against Nelson, Gassaro, and Perrone. Shamy was neither a defendant nor a co-conspirator under Count 1. There are two sets of paragraphs numbered 1 through 16 in Count 1. The first set details the scheme to defraud alleged by the government against Nelson, Gassaro, and Perrone, and the second set of paragraphs numbered 1 through 16 contains a listing of overt acts alleged to be in furtherance of said conspiracy to commit mail fraud. Not only is it unclear from the face of the Indictment which paragraphs 1 through 16 were referred to, but the jury received no specific instruction concerning which paragraphs they might look to as included in Count 4, although they were allowed to have the Indictment in the jury room with them.

The trial court did not read the entire Indictment during the charge to the jury but, rather, read only the charging paragraphs of each count. The jury was charged as follows concerning overt acts:

> The United States does not have to establish all of the overt acts set forth in the indictment. Indeed, if you find that just one overt act, whether specifically

enumerated under Counts 1 or 4 or not was committed by any co-conspirator in furtherance of the conspiracy, then the requirement that the United States establish an overt act has been satisfied as to each member of the conspiracy.

In short, the jury could have concluded that any of the overt acts alleged in Count 1 could be sufficient to prove the offense in Count 4. In effect, the language of Count 4, by incorporating the language of Count 1, charged that the conspiracy alleged in Count 4 was part of a larger conspiracy, and set forth many more overt acts that might be considered by the jury in determining the guilt of the defendants in Count 4. To add to the confusion, the indictment charged and the court further instructed the jury as a prologue to the overt acts in Count 1 that:

> It was part of said conspiracy that defendants Nelson and Gassaro would conceal their interests in and knowledge about the property from the members of the City Council and the taxpayers and citizens of the City of New Brunswick.
>
> It was further part of said conspiracy that defendants Nelson and Gassaro and others would not report their profits on this transaction to the appropriate tax authorities.
>
> It was further part of said conspiracy that defendants and others would conceal and make misrepresentations about their involvement and interests on this transaction to representatives of federal law enforcement agencies.
>
> It was futher part of said conspiracy that defendants and others would take steps designed to con-

> ceal their illegal activities by, among other means, the fabrication and altering of the documents and submission of these documents to representatives of federal law enforcement agencies and to a grand jury investigating the facts and circumstances of this case. In furtherance of said conspiracy and to effect the objects thereof, the following overt acts were committed:

It is well settled that a conviction must be vacated and the indictment dismissed when (1) there was at trial a variance between the indictment and the proof, and (2) the variance prejudiced a substantial right of the defendant. *See, e.g., Berger v. United States,* 295 U.S. 78, 82 (1935); *United States v. Schurr,* 775 F.2d 549 (3d Cir. 1984); *United States v. Maker,* 751 F.2d 614, 624 (3d Cir. 1984). The reasons for the rule proscribing any material variance between indictment and the proof at trial are threefold. First, the rule protects the right of each defendant "not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by other." *Kotteakos v. United States,* 328 U.S. 750, 775 (1946). A variance may be held to be material because "the jury might have been unable to separate offenders and offenses and easily could have transferred the guilt from one alleged co-conspirator to another." *United States v. Schurr, supra* (quoting *United States v. Camiel,* 689 F.2d 31, 35 (3d Cir. 1982)). Second, the rule protects the defendant's right to an indictment which sufficiently informs him of the charges so that he may adequately prepare his defense. *United States v. Schurr, supra,* at 553-54. Third, the rule against variance insures against the danger that

the defendant may be prosecuted a second time for the same offense. *United States v. Schurr, supra,* at 554.

In determining whether or not a variance between the broader conspiracy outlined in the indictment and the conspiracy proved at trial exists, the Court is guided by three factors that should be considered: (1) the overlap of the participants; (2) a similarity in method of operations; and (3) a similarity in purpose. *United States v. Maker,* 751 F.2d 614, 624-26 (3d Cir. 1984); *United States v. Schurr, supra,* at 555. An analysis of these three factors in the instant case reveals that there was a variance between the proof at trial and the conspiracy alleged in the indictment.

First, the conspiracy to obstruct justice alleged in the Indictment included and reincorporated all the allegations of Paragraph 1 through 16 of Count 1 of the Indictment, the mail fraud conspiracy. The mail fraud conspiracy count named three defendants, Nelson, Gassaro, and Perrone. The proof at trial, however, in no way linked George Shamy, who was charged in Count 4, with the mail fraud conspiracy. The only overlap between the participants of the larger conspiracy and the participants of the smaller conspiracy for which proof was offered at trial was the defendant Nelson. There was no evidence that defendants Gassaro or Perrone in any way participated in the alleged altering of the closing statement or the alleged fabrication of the April 16, 1983 letter. Similarly, there was no evidence at trial that George Shamy was involved in the events concerning the sale of the property to the City of New Brunswick. The presence of one common participant in two otherwise separate and distinct conspiracies does not create one larger conspiracy. *Kotteakos v. United States, supra,* at 773.

As to the other two factors, similarity in method of operations and similarity of purpose, the broader conspiracy charged in the indictment encompassed a great many more acts which were allegedly for the purpose of defrauding the citizens of the City of New Brunswick, while the conspiracy shown at trial encompassed a few specific acts allegedly for the purpose of obstructing the investigation of the Federal Grand Jury.

The question remains whether the variance between the broad conspiracy outlined in the Indictment and the narrow conspiracy for which evidence was introduced at trial was material enough to prejudice a substantial right of the defendant. It is obvious that in this case the jury was unable to separate offenders and offenses and could have transferred the guilt from one alleged co-conspirator to another. The jury was properly instructed that it could consider an overt act committed by one co-conspirator in order to find that the offense of conspiracy in Count 4 had been established. Likewise, the jury was instructed that the acts of one or any co-conspirator can be considered against any of the other co-conspirators. What was not clear from the court's instructions or from the Indictment itself was the fact that an overt act committed by one of the co-conspirators in Count 1 could not be considered for the purpose of establishing the conspiracy alleged in Count 4. It is possible that George Shamy and Gilbert Nelson were convicted on Count 4 based on the overt acts alleged as part of the Count 1 conspiracy. The trial court's failure to grant a new trial on Count 4, and the Court of Appeals' failure to reverse that judgment below, was a departure from the accepted and usual course of judicial proceedings calling for the exercise of this Court's supervisory power.

But Mr. Shamy's rights were also prejudiced in another way by the language of Count 4. In Count 4, Mr. Shamy is joined in a conspiracy count with Gilbert Nelson and charged with altering the closing statement in 1985, withholding the $1,000 realty transfer fee, and attempting to cover up the failure to forward the $2,500 fee to the New Brunswick Tax Collector. The jury was instructed that it could consider any of these alleged acts of Mr. Nelson in determining Mr. Shamy's guilt of conspiracy to obstruct justice in Count 4. But there was no evidence at trial linking Mr. Shamy in any way to the altering of the closing statement, the withholding of the realty transfer fee, or the failure to forward the water and the sewer charge fee to the New Brunswick Tax Collector.

This case is analogous to the case of *United States v. Cryan,* 490 F. Supp. 1234 (D.N.J. 1980), *aff'd,* 636 F.2d 1211 (1981). In that case, the court granted a mistrial holding that evidence of the Lerner Transaction was admissible only against Lerner, and that a limiting instruction would not have been sufficient to cure the prejudicial impact of the evidence. 490 F. Supp. at 1238. In so holding, the trial court relied on the principles set forth in *Kotteakos v. United States, supra*:

> 'An indictment may not charge multiple conspiracies in a single count.' *Kotteakos v. United States,* 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946); *United States v. Kenny,* 462 F.2d 1205, 1216 (3d Cir.), *cert. denied,* 409 U.S. 914, 93 S. Ct. 233, 34 L. Ed. 2d 176 (1972). . . . *See Kotteakos v. United States, supra,* 328 U.S. at 769-70, 66 S. Ct. at 1250.

490 F. Supp at 1239. In this case the government did not present any independent evidence that Mr. Shamy was aware of or participated in the acts allegedly performed

by Mr. Nelson. It is fundamental that an individual may not be convicted on the basis of another person's acts which he neither authorized nor adopted. *United States v. Cryan, supra,* at 1242. Thus, in order to properly convict Mr. Shamy, the government had to prove that he either committed or authorized the acts charged in the indictment. *Id.* at 1243. Since the government failed to prove any connection between Mr. Shamy and the other acts committed by Mr. Nelson, Mr. Shamy's conviction on Count 4 should have been reversed and the indictment dismissed.

III.
THE COURT BELOW ERRED IN UPHOLDING THE VALIDITY OF THE CONSPIRACY CHARGED IN COUNT 4 ON THE BASIS OF *UNITED STATES V. PERLSTEIN*

The decision of the Court below upholding the validity of Count 4, the conspiracy to obstruct justice, rests on its view that *United States v. Perlstein*, 126 F.2d 789 (3d Cir.), *cert. denied*, 316 U.S. 678 (1942), controls this case. This Court should grant the writ because the decision below misapprehends the holding in *Perlstein* and erroneously expands the law concerning conspiracies to obstruct federal proceedings which have not commenced, contrary to this Court's holding in *Pettibone v. United States*, 148 U.S. 197 (1893).

In *Perlstein*, the Court of Appeals for the Third Circuit held over a lengthy and vigorous dissent that individuals can conspire to obstruct federal proceedings which have not commenced so long as they agree to obstruct federal proceedings should they commence and undertake to do so once the federal proceedings have commenced. The

Court distinguished a conpsiracy to obstruct Federal proceedings from the substantive crime of obstruction (which requires the existence of federal proceedings) on the basis that the crime of conspiracy consists of unlawful agreement. At first blush, this case apparently substantially relaxes the pending judicial proceeding requirement set forth in *Pettibone*. A prerequisite for a conviction for conspiracy to obstruct justice is the pendency of a judicial proceeding which equates with an "administration of justice." *United States v. Rogers*, 636 F. Supp. 237, 252 (D. Colo. 1986); *accord, United States v. McComb*, 744 F.2d 555, 560 (7th Cir. 1984). However, a close reading of the case reveals that for the conspiracy to be actionable the contemplated acts must occur while a judicial proceeding is pending. The breach in the pending proceeding requirement created by *Perlstein* is therefore minor and should be largely inconsequential. The case comprehends only conspiracies to perform acts of obstruction during subsequent judicial proceedings.

The *Perlstein* conspiracy alleged seven overt acts, five of which occurred after the federal grand jury investigation commenced, and involved efforts by the defendants to obstruct the federal proceedings.

By constrast, six of the seven overt acts charged in Count 4 of the indictment in this case occurred before the commencement of any federal proceedings. In fact, *all* of the overt acts which Nelson is alleged to have committed occurred on or before May 7, 1985 – months before any federal proceedings commenced.

If *Perlstein* is extended to the conspiracy in this case, the government and federal prosecutors will be permitted in the future to simply charge a conspiracy to obstruct justice rather than bother to bring a charge of substantive

obstruction of justice, or perjury. Thus, the crime of conspiracy to obstruct justice will abrogate the crimes of substantive obstruction of justice and perjury.

IV.

THE COURT BELOW ERRED BY DECLINING TO GRANT PETITIONERS A NEW TRIAL ON COUNT 4, CONSPIRACY TO OBSTRUCT JUSTICE, IN THAT NELSON AND SHAMY WERE NOT AFFORDED A FUNDAMENTALLY FAIR TRIAL UNDER THE TOTALITY OF THE CIRCUMSTANCES.

Petitioners Nelson and Shamy stand in the unusual position of having been convicted, Nelson on six counts and Shamy on two counts, on all counts that went to the jury, yet all but one of those counts have subsequently been dismissed or reversed by the courts below. The trial court granted a judgment of acquittal on the Hobbs Act counts, then granted a new trial on the conspiracy to commit mail fraud count based on this Court's decision in *McNally v. United States*, __ U.S. __, 107 S. Ct. 2875 (1987). The Court of Appeals granted a new trial on the obstruction of justice counts because of the trial court's restriction of cross-examination concerning an essential element of the offense. The sole remaining conviction is on Count 4, conspiracy to obstruct justice. As set forth in Reasons I and II, *supra*, the conviction on Count 4 was tainted by the prejudicial spillover from Counts 1, 2, and 3, the trial court's failure to grant the Rule 29 motions on counts 2 and 3 until after the jury's verdict, and by the variance between the conspiracy charged in the Indictment and the proofs at trial. Even if the Court of Appeals had properly concluded that no one of these errors

rose to the level of reversible error, surely the cumulative effect of these errors denied Petitioners Nelson and Shamy a fair trial. The Court of Appeals was bound to consider whether "under the totality of the circumstances" Nelson and Shamy have "been afforded a fundamentally fair trial." *United States v. Newman*, 490 F.2d 139, 147 (3d Cir. 1974); *accord, United States v. Robinson*, 504 F.2d 301, 308 (2d Cir. 1976). The Court of Appeals' decision upholding the judgment of the trial court in this case, wherein the totality of the circumstances clearly demonstrate that Nelson and Shamy have not been afforded a fundamentally fair trial, is a departure from the accepted and usual course of judicial proceedings mandating the exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

s/ M.Q.

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Dated: September 12, 1988

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-5529 & 87-5561

UNITED STATES OF AMERICA
v.
GILBERT NELSON,
Appellant, No. 87-5529

UNITED STATES OF AMERICA
v.
GEORGE SHAMY
Appellant, No. 87-5561

Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal No. 87-00041-01/04)

Argued June 6, 1988
Before: STAPLETON, GREENBERG and
ROSENN, *Circuit Judges*
(Filed July 26, 1988)

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OPINION

GREENBERG, *Circuit Judge.*

Gilbert Nelson and George Shamy appeal their convictions for conspiracy to obstruct justice (18 U.S.C. § 371) and obstruction of justice (18 U.S.C. § 1503). We will affirm the conspiracy convictions but, because the district

court unreasonably limited the appellants' inquiry on cross-examination of a government witness regarding whether there was a grand jury investigation pending when they allegedly obstructed justice, we will reverse the convictions on the substantive obstruction counts.

I.

Background

These are the germane facts developed at the trial. After rather complicated negotiations, on March 16, 1983 the City of New Brunswick, New Jersey entered into an agreement to purchase property from Richard Malouf for use as a central garage for the maintenance and repair of city vehicles. Malouf acquired the property earlier that year and closed on it on March 1, 1983. Malouf's purchase had been partially financed with $20,000 invested by James V. Gassaro, the city's police director who was also an attorney sharing offices with Nelson, and with $25,000 borrowed from Gassaro's father-in-law, Joseph Perrone. The interests of Gassaro and Perrone were not disclosed to the city council when it authorized the purchase of the property even though Gassaro was to share in the profits.

When Malouf closed on the sale to the city on May 5, 1983 he received a check for $305,000 from the city which he endorsed and gave to Nelson as the New Brunswick city attorney for deposit in Nelson's attorney's trust account. The proceeds of the check were to be disbursed in accordance with a closing statement prepared by Nelson which showed a total of $96,695.56 due Malouf after de-

ductions from Malouf's proceeds for satisfaction of a mortgage and a realty transfer fee, and a credit for outstanding real estate taxes to the city as purchaser. Nelson, however, returned to Malouf a check for only $91,695.56, exactly $5,000 less than due under the statement. Further, Nelson did not pay the $1830.50 which he showed due for the transfer fee or the $1067.50 real estate taxes due.[1]

On May 6, 1983 when Malouf went to the Gassaro-Nelson offices to divide the sale proceeds with Perrone and Gassaro, Nelson was there but Gassaro was not. Malouf gave Nelson checks for $20,000 and $25,000 made payable to Gassaro and Perrone, respectively, for their cash contributions and at Nelson's direction he made out a check for $25,000 payable to a defunct paving company to cover Gassaro's share of the profits. In return Nelson gave him a statement showing that this $25,000 was for property improvements but that was a fiction as none were made.

In March 1985, Assistant United States Attorney Thomas L. Weisenbeck, with assistance from the FBI, began an investigation into allegations of corruption in New Brunswick. A grand jury subpoena to Nelson's bank for his records, the first of three grand jury subpoenas secured during the early months of the investigation, was issued on March 7, 1985 from the office of the clerk of the

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1 Even though the city was the purchaser there is no question that Nelson should have paid the real estate taxes. There was, however, no transfer fee due on the conveyance as it was exempt. N.J. Stat. Ann. § 46:15-10(b) (West Supp. 1988). Thus no provision for the fee should have been made on the closing statement.

United States District Court pursuant to Weisenbeck's application. In late March an FBI agent visited Malouf and asked to see the closing statement. Although Malouf did not have a copy he obtained one from the attorney who represented him at the closing, an associate of Shamy, and realized for the first that he had been paid $5,000 less than due.

Nelson soon learned about the investigation from a newspaper reporter and contacted Malouf asking to see his copy of the closing statement. After securing the statement, Nelson added the following language to account for the $5,000 he withheld from Malouf's closing proceeds two years before: "To Seller - $91,695.56. To George Shamy, in payment of outstanding legal fees due him by Richard Malouf - $5,000." At about the same time Nelson also took steps to pay the real estate taxes on the property in an unusual way. Specifically he had the city tax records modified so that a tax payment he made on another property in 1983 was shown as having been partially made on the Malouf property. Naturally this maneuver retroactively created an outstanding balance on the other property which Nelson paid.

Shamy was served on April 10, 1985 with a grand jury subpoena and on April 16, 1985 he went to the office of the United States Attorney in Newark for an interview. On that occasion he explained that he resigned from the practice of law early in 1983 and entered a hospital in Ohio. He claimed that at the time of his resignation Malouf owed him approximately $5,000 in legal fees and also asserted he borrowed $6,000 from Nelson because of gambling at the racetrack. He said that when he returned from Ohio he arranged for $5,000 to be withheld from

Malouf at the closing for payment to Nelson in accordance with a proposal he had made in a letter to Nelson.

Nelson was served with a grand jury subpoena on April 15, 1985, a day before Shamy's interview, and on May 7, 1985 he turned over Shamy's letter, dated April 16, 1983, and a copy of the altered closing statement to the United States Attorney. The letter indicated that Shamy would get Malouf to authorize the withholding of the fees.

During the investigation the government learned that the letter, allegedly dictated by Shamy to his secretary in April 1983, deviated from Shamy's secretary's usual format for correspondence, thus suggesting it was a fabrication. The secretary later testified at the trial that she could not say with certainty that she did not type the letter, though she did not recall doing so, and pointed out how the letter deviated from her usual format.

Weisenbeck left the United States Attorney's office in September 1985 before any evidence was presented to the grand jury on whose authority he had secured the subpoenas. In due course, the investigation went forward and evidence was eventually presented to a new grand jury. On December 30, 1986 Shamy appeared before the grand jury and testified that while he was in the Ohio hospital he called his secretary in New Jersey and dictated a letter to Nelson suggesting that Nelson withhold the fees due from Malouf at the closing and keep the money as payment for the racetrack loan. Shamy claimed he signed the letter when he returned to New Jersey in April 1983.

Ultimately the grand jury returned an indictment charging Nelson, Gassaro and Perrone with conspiracy to commit mail fraud to deprive the citizens of New Brunswick of honest government (18 U.S.C. § 371)(count 1)

and extortion and conspiracy to extort in violation of the Hobbs Act (18 U.S.C. §§ 1951 and 1952)(counts 2 and 3). In addition, Nelson and Shamy were charged with obstruction of justice and conspiracy to obstruct justice. The conspiracy to obstruct justice count (count 4) alleged that Nelson and Shamy had schemed to cover-up Nelson's wrongful withholding of fees, taxes and proceeds due Malouf and the city at the closing by, among other means, fabricating the April 16, 1983 letter and altering the closing statement, and by Shamy giving false testimony before the grand jury. The first of the two substantive counts charging obstruction of justice (count 5) alleged that Nelson and Shamy had obstructed justice by producing the fabricated letter in response to a grand jury subpoena. The second (count 6) charged Nelson with obstruction of justice by altering the closing statement.

There was a subsequent single trial against all the defendants on the entire indictment. The district judge granted Perrone's motion for judgment of acquittal on all counts at the close of the government's case. Though the jury found Nelson, Gassaro and Shamy guilty on all counts, the mail fraud convictions were subsequently dismissed by the judge on the basis of the Supreme Court's decision in *McNally v. United States,* __ U.S. __, 107 S.Ct. 2875 (1987), which held that the mail fraud statute does not reach schemes to defraud citizens of their intangible right to honest and impartial government. The judge also granted post-verdict acquittals to Nelson and Gassaro on the Hobbs Act extortion counts as the evidence was insufficient to support the convictions on them. Therefore, the only convictions left undisturbed were those of appellants for obstruction of justice and conspiracy to obstruct jus-

tice based on their attempts to cover-up the events relating to the diversion of funds from the proceeds of the property purchase by the city.

II.

Obstruction of Justice

A.

The obstruction of justice statute provides that whoever "corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined . . . or imprisoned . . . or both." 18 U.S.C. § 1503. The parties agree that the pendency of some sort of judicial proceeding, which in this case could only be a grand jury investigation, is a necessary prerequisite for a conviction for violation of 18 U.S.C. § 1503. *See United States v. Simmons,* 591 F.2d 206, 208 n.2 (3rd Cir. 1979). They disagree, however, over whether the three grand jury subpoenas secured by Weisenbeck prior to production of the letter and closing statement on May 7, 1985 are sufficient to establish that there was a pending grand jury investigation which appellants could have obstructed.

When appellants' attorneys attempted to cross-examine Weisenbeck about the pendency of the grand jury investigation, the trial judge barred much of their inquiry as irrelevant as she believed that if a grand jury was sitting at the time the subpoenas were issued, a judicial proceeding was pending as a matter of law. While the appellants do not dispute that a grant jury was sitting at the time Wei-

senbeck secured the subpoenas, they argue that inquiry into the pendency of the grand jury investigation should not have ended with establishment of that fact. Thus, in their view, the trial court unreasonably limited their cross-examination and infringed their Sixth Amendment right of confrontation. We agree that the cross-examination was unreasonably limited.

B.

The grand jury subpoenas served on Nelson, Shamy and Nelson's bank were issued by the Office of the Clerk for the District of New Jersey on standard forms signed by the deputy clerk. Fed. R. Crim. P. 17(a) provides for issuance of subpoenas "signed and sealed but otherwise blank to a party requesting it, who shall fill in the blanks before it is served." Because these subpoenas are issued without meaningful judicial oversight, the pendency of a grand jury investigation cannot be determined from their face alone. Not every investigation in which grand jury subpoenas are used ripens into a pending grand jury investigation for purposes of 18 U.S.C. § 1503. *Simmons*, 591 F.2d at 210.

Although the grand jury's role in the early phase of an investigation can be unclear, we have resisted adoption of rigid standards for determining when a prosecutor's inquiry ripens into a grand jury investigation. In particular, we have rejected suggestions that an investigation be deemed pending only if (1) the grand jury actually hears testimony, (2) the grand jury plays an active role in the decision to issue the subpoena, or (3) the grand jury is aware of the subpoena at the time of the alleged obstruction of jus-

tice, for such rules can be easily circumvented by the government and offer the guilty a sanctuary among "empty technicalities." *See United States v. Shoup*, 608 F.2d 950, 962 (3d Cir. 1979); *Simmons*, 591 F.2d at 209-10 ("empty technicalities"); *United States v. Walasek*, 527 F.2d 676, 678 (3d Cir. 1975)("easily circumvented"). In place of rigid rules, we have counselled a case by case inquiry into whether the subpoenas were issued in furtherance of an actual grand jury investigation, *i.e.*, whether they were issued "to secure a presently contemplated presentation of evidence before the grand jury." *Walasek*, 527 F.2d at 744 F.2d 555, 561 (7th Cir. 1984), *Shoup*, 608 F.2d at 962, and *Simmons*, 591 F.2d at 210. *See also United States v. Ryan*, 455 F.2d 728 (9th Cir. 1972), *discussed in Simmons*, 527 F.2d at 209, *Walasek*, 527 F.2d at 680 n.13, and *United States v. Vesich*, 724 F.2d 451, 454 (5th Cir. 1984). This case by case inquiry is, of course, factual.

C.

In instructing the jury on the obstruction counts, the district judge correctly explained that "a grand jury proceeding is pending for the purposes of this statute if an Assistant U.S. Attorney has issued a subpoena in furtherance of the grand jury investigation." At trial, however, she unreasonably limited inquiry into whether the subpoenas were issued to secure a presently contemplated presentation of evidence before the grand jury.

During cross-examination about his role in the investigation of alleged corruption in New Brunswick, Weisenbeck testified that he scheduled no time for the case before the grand jury prior to leaving the United States At-

torney's office in September 1985, he had no recollection of inspecting the records subpoenaed from Nelson's bank, and he could not recall whether those records were delivered to the grand jury before his departure. The judge, however, barred further inquiry into the pendency issue. She explained at sidebar, clearly referring to situations in which a grand jury subpoena has been issued, that if "there is a sitting grand jury . . . there is a judicial proceeding pending. It's not a factual finding. We already have the evidence."

We agree that to establish the pendency of a judicial proceeding for purposes of 18 U.S.C. § 1503 a grand jury must be sitting at the time the subpoena issues; otherwise, the United States Attorney cannot be said to be acting as an agent for that body. The sitting panel, however, need not be the one that ultimately receives the evidence. The difficulty with sustaining the trial judge's ruling, however, is that it would unreasonably interfere with the ability of many defendants to challenge an investigative agency's use of grand jury subpoenas for in larger venues there is seldom an occasion when a grand jury is not sitting. Thus, under her ruling the legitimacy of subpoenas issued during a panel's tenure would be inexorably assured. That consequence cannot be reconciled with our precedents and those of other courts of appeal which have rejected mechanical tests for determining whether proceedings are pending in favor of case by case inquiries into the circumstances surrounding the issuance of grand jury subpoenas.

A party on trial for obstruction of a grand jury investigation alleged to have begun upon the issuance of a grand jury subpoena must be afforded an opportunity to question whether the United States Attorney or his or her rep-

resentative secured the subpoena in furtherance of a then present contemplation that the subpoenaed evidence would be presented to a grand jury. *Walasek*, 527 F.2d at 678. If a decision has been made to present the matter to the grand jury, it makes no difference whether the ultimate presentation includes all, some or none of the materials actually received in response to the subpoena alleged to have commenced the grand jury investigation. Of course, if those materials are not presented to a grand jury, that may be relevant circumstantial evidence as to whether the requisite present intention existed at the time the subpoena was issued.

Because the appellant's inquiry on cross-examination into Weisenbeck's intentions in securing the subpoenas was unreasonably limited, we find that the trial judge's ruling constituted reversible error.[2] *See United States v. Newman*, 490 F.2d 139, 145 (3d Cir. 1974). The appellants, therefore, must be granted a new trial on counts 5 and 6.

D.

Appellants urge that the evidence at trial was insufficient to support their convictions for obstruction of justice

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2 The government does not argue that the limitation on cross-examination was harmless. In any event, we are not persuaded that it was. The issue involved, the pendency of the grand jury proceeding, involved facts peculiarly within the knowledge of the government. *See Delaware v. Van Arsdall*, 475 U.S. 673, 680-84, 106 S.Ct 1431, 1436038 (1986). Thus, it is difficult to understand how the appellants could develop evidence on the issue except from government witnesses.

and thus their motions for acquittal should have been granted. We disagree.

It is undisputed that there was an investigation, at least by the United States Attorney and the FBI, into the property purchase and that a grand jury was sitting. Appellants knew of the investigation. The evidence supported a finding that appellants caused documents to be fabricated or modified to make it appear that the proceeds of the sale due Malouf had been legitimately disbursed. Further, while the matter was not presented to a grand jury during Weisenbeck's tenure, we cannot say that the subpoenas could not have been issued in furtherance of a present contemplation to present evidence to a grant jury. This was a rather complicated matter and it is natural that it took time to gather the evidence. In this regard we point out that Weisenbeck indicated that he could not remember seeing the bank records but that sometimes it takes months to get them in response to a subpoena. Furthermore, it is reasonable to infer that his departure from the office about six months after the investigation started may have delayed the matter. In the circumstances, allowing the government the reasonable inferences to be drawn from the evidence, we cannot say that the evidence was insufficient to support convictions on the obstruction counts. *See Jackson v. Virginia*, 433 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); *Government of Virgin Islands v. Williams*, 739 F.2d 936, 940 (3d Cir. 1984).[3] Nevertheless appellants are entitled to a new trial on counts 5 and 6 for

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3 Because of our result, we need not specially address appellants' other challenges to the convictions on counts 5 and 6 though in fact we pass upon them in considering count 4.

the reasons already set forth.

III.

Conspiracy to Obstruct Justice

The appellants join in a three pronged attack on count 4 charging them with conspiracy to obstruct justice in violation of 18 U.S.C. § 371. These attacks are without merit.

A.

First, the appellants argue that count 4 was transformed into a dual-purpose conspiracy embracing both obstruction of justice and mail fraud because it incorporated the first 16 paragraphs of count 1, the mail fraud count. In addition, because the list of "overt acts" attached to count 1 by coincidence also contained 16 paragraphs, the appellants argue that the jury may have mistakenly imported those acts rather than the first 16 paragraphs of count 1 into count 4.

Our reading of the indictment convinces us that the possibility of confusion suggested by the appellants is remote. The first 16 paragraphs of count 1 are incorporated into each of the five remaining counts for the obvious purpose of identifying the defendants and providing background. Furthermore, in her charge the judge explained that:

> The statute setting forth the crime of conspiracy . . . which is charged in the *first count*, is Title 18,

United States Code, Section 371, which reads: 'If two or more persons conspire [. . .] to commit any offense against the United States [. . .], and one or more of such persons do any act to effect the object of the conspiracy, each shall be guilty of an offense against the laws of the United States.' This statute creates a separate and distinct crime from any other crime charged in the indictment. I tell you that the same conspiracy statute is charge in *Count 4*. Each of these conspiracies, however, is charged to have a *different object*.

. . . .

In this case as alleged in *Count 1*, the purpose or plan alleged is that *defendants Nelson and Gassaro*,[4] conspired to commit mail fraud by agreeing to devise a scheme to defraud the City of New Brunswick, its citizens and taxpayers, and to obtain money by means of false pretenses and by using the United States mails or causing the mails to be used to execute their scheme.

In *Count 4*, the purpose or plan alleged is that *defendants Nelson and Shamy* agreed to obstruct justice or endeavored to obstruct justice by fabricating documents, altering records, and producing fabricated and altered documents to federal law enforce-

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4 Inasmuch as Perrone's motion for acquittal was granted at the end of the government's case he was not mentioned as a possible conspirator. Of course, the underscoring of potions of the charge was done by us as the charge was oral. We do not suggest that the district judge emphasized these portions.

> ment officers while a grand jury proceeding was pending.

It is thus clear that the offenses in counts 1 and 4 were so distinct that the possibility that there was confusion between them exists only in the minds of the appellants.

B.

For the second prong of their attack on the conspiracy convictions, the appellants argue that the judge created confusion about counts 1 and 4 by instructing the jury that:

> The United States does not have to establish all of the overt acts set forth in the indictment. Indeed, if you find that *just one overt act*, whether specifically *enumerated under Counts 1 or 4* or not was committed by any co-conspirator in furtherance of the conspiracy, then the requirement that the United States establish an overt act has been satisfied as to each member of the conspiracy.

The appellants argue that from this instruction the jury could have concluded that the commission of any overt act alleged in count 1 would be sufficient to prove the conspiracy to obstruct justice alleged in count 4. The likelihood of such confusion is eliminated, however, if the passage is read in context, for the judge also explained that:

> In order to find a defendant guilty of conspiracy in Counts 1 and 4, you must also find beyond a rea-

> sonable doubt that one or more overt acts were committed in furtherance of the conspiracy by one or more persons you find to be members of the conspiracy. An overt act is an act knowingly committed by one of the conspirators in an effort to effect, achieve, or accomplish some object or purpose of the conspiracy. The act itself need not be criminal in nature if considered separately and apart from the conspiracy. It may be as innocent on its face as the act of meeting, writing a letter, depositing a check, or talking on the telephone. However, it must be an act that follows and tends toward the accomplishment of the plan or scheme, and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

We have already noted that the judge took great care to distinguish between the conspiracies alleged in counts 1 and 4. Furthermore, the separate lists of overt acts attached to each count reinforce the independence of the conspiracies. Thus, when viewed as a whole, the court's instructions made clear that to return a guilty verdict on count 4 the jury had to find that Nelson or Shamy committed an overt act in furtherance of a conspiracy to obstruct justice, and that to return a guilty verdict on count 1 it was required to find that Nelson or Gassaro committed an overt act in furtherance of a conspiracy to deprive the public of honest government through mail fraud. Inasmuch as the appellants have failed to demonstrate that the evidence was too complex for the jury to compartmentalize, *United States v. Dickens*, 695 F.2d 765, 778-79 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092, 103 S.Ct. 1792,

and 461 U.S. 909, 103 S.Ct. 1883 (1983), and likewise have not overcome the presumption that the jury properly followed the court's instructions, *United States v. Restaino*, 405 F.2d 628, 630 (3d Cir. 1968), *cert. denied*, 394 U.S. 904, 89 S.Ct. 1012 (1969), we find no ground for a new trial on count 4 in appellant's selective reading of the jury charge.

C.

For the third prong of their attack on the conspiracy convictions, the appellants argue that they were denied a fair trial due to the prejudicial spillover of irrelevant matters from the mail fraud (count 1) and Hobbs Act extortion counts (counts 2 and 3) on which the jury returned guilty verdicts but which the judge later dismissed. They indicate that the prejudice to them was aggravated by the trial judge's failure to grant their motions for acquittal on counts 2 and 3 at the end of the government's case.[5] The mail fraud and Hobbs Act charges related to events culminating in May 1983. The conspiracy to obstruct justice

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5 The judge reserved judgment on the motion. The government concedes this was an error. *United States v. Neary*, 733 F.2d 210, 218 (2d Cir. 1984). We find that the error was harmless. In any event the prejudice to a defendant from reservation on a motion for acquittal is wholly distinct from the prejudice appellants assert here. Fed. R. Crim. P. 29(a) is construed to require that the judge grant a motion for acquittal at the close of the government's case if the evidence is insufficient to sustain a conviction because if the court reserves on the motion the defendant may risk having to decide whether to offer evidence and thereby waive his claim that the government's case was insufficient. *Neary*, 733 F.2d at 219.

focused on activities starting almost two years later and related to a cover-up of how the proceeds of the sale were disbursed rather than the legitimacy of the basic transaction. Indeed, no overt act in count 4 is alleged to have been committed prior to March 26, 1985. Further, the judge instructed the jury that:

> Each offense, and the evidence pertaining to it, and to each defendant, should be considered separately. The fact that you may find one or more of the defendants guilty or not guilty of one of the offenses charged should not control your verdict as to any other offense or any other defendant charged.

In addition, she told the jury that count 4 charged that appellants had conspired and agreed to conceal that Nelson had unlawfully diverted funds from Malouf and the city by altering and fabricating documents and by causing these altered and fabricated documents to be turned over to federal law enforcement officials during the course of a grand jury investigation. In the circumstances we cannot understand why the jury would not have been able to consider count 4 apart from the first three counts. Clearly the judge's cautionary instructions and explanations of the charges neutralized the threat of prejudice and the appellants were afforded a fundamentally fair trial. *See United States v. Brown*, 583 F.2d 659, 669 (3d Cir. 1978), *cert. denied*, 440 U.S. 909, 99 S.Ct. 1217 (1979).

D.

Shamy raises an additional challenge to his conviction for conspiracy to obstruct justice. Noting that there is no

direct evidence linking him to several of the overt acts allegedly committed by Nelson in furtherance of the conspiracy, including alteration of the closing statement and alteration of city tax records, Shamy complains that he may have been convicted of conspiracy on the basis of acts he neither authorized nor adopted. We, however, are satisfied that the jury could reasonably have found there was a conspiracy between Shamy and Nelson to obstruct justice and there were overt acts committed in furtherance of the conspiracy during its existence. Thus, Shamy was responsible for the acts even if committed by Nelson. *See United States v. Riccobene*, 790 F.2d 214, 225 (3d Cir.), *cert. denied*, 464 U.S. 849, 104 S.Ct. 157 (1983); *United States v. Addonizio*, 449 F.2d 100, 102, (3d Cir.), *cert. denied*, 404 U.S. 1058, 92 S.Ct. 737 (1971).

At trial the United States presented evidence that: (1) Nelson withheld $5,000 from Malouf's closing proceeds without informing Malouf he was doing so; (2) two years later, upon learning about Weisenbeck's investigation, Nelson altered Malouf's closing statement, adding a notation representing that $5,000 had been withheld on Shamy's behalf; (3) when interviewed by Weisenbeck, Shamy claimed that he had proposed that Nelson withhold $5,000 from Malouf; (4) Nelson produced a letter dated April 16, 1983 in which Shamy outlined his proposal that Nelson withhold $5,000 from the proceeds; (5) at his appearance before the grand jury, Shamy testified that he had dictated the letter to his secretary while in Ohio and had signed it upon his return to New Jersey; and (6) Shamy's secretary could not recall preparing such a letter and noted numerous differences between the letter produced by Nelson and her usual format for such corre-

spondence. Although different results could be fashioned from this evidence, the jury could find beyond a reasonable doubt that appellants worked together to cover-up Nelson's wrongful withholding of funds from both the city and Malouf. Further, there was evidence which the jury seems to have accepted that Shamy himself committed overt acts in furtherance of the conspiracy by fabricating the April 16, 1983 letter and by giving false testimony to the grand jury.[6]

E.

Although we reverse the substantive obstruction convictions on the basis of the district court's improper limitations of Weisenbeck's cross-examination, our ruling is not fatal to the conspiracy convictions. The district court instructed the jury as follows with respect to the count charging a conspiracy to obstruct justice:

> [It is not] necessary that the United States prove that the conspirators used all of the means that are charged in the indictment. It is sufficient if the United States proves, beyond a reasonable doubt, that the conspirators knowingly and intentionally agreed

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6 We also reject Shamy's challenges to the judge's denial of his pretrial motion to dismiss based on prosecutorial misconduct before the grand jury, to her denial of his motion for severance, and to her ruling allowing the government to caution the jury not to speculate on the significance of his failure to testify after his own attorney drew the jurors' attention to it. We have studied the judge's ruling on these matters and find them to be correct.

> to endeavor to try to obstruct justice by one of the means charged, and that one or more of the conspirators thereafter undertook some specific overt act charged in the indictment with the intent to accomplish this unlawful goal.
>
> With regard to Count 4, it is also not necessary that the United States prove that a grand jury proceeding was pending at all times when defendants conspired to obstruct justice. It is sufficient if the United States proves defendants entered into such a conspiracy expecting that judicial proceedings would be instituted in the future and committed an overt act in furtherance of the conspiracy after grand jury proceedings began.

To the extent this instruction required that an overt act occur after the grand jury proceedings began, it may have been unduly favorable to the defense. However, it correctly reflects the law of this Circuit that one can conspire to obstruct an anticipated but as yet uncommenced grand jury proceedings, *United States v. Messerlian*, 832 F.2d 778, 792-93 (3d Cir. 1987), *cert. denied*, __ U.S. __, 108 S.Ct. 1291 (1988); *United States v. Perlstein*, 126 F.2d 789, 795-96 (3d Cir. 1941), *cert. denied*, 316 U.S. 678, 62 S.Ct 1106 (1942). given the court's instructions, the jury's conclusion of guilt necessarily reflects findings that Nelson or Shamy willfully agreed to obstruct the grand jury investigation referred to in count 4 and that, for the purpose of obstructing that proceeding, one of them committed at least one of the alleged overt acts. No more is required to support their conviction for conspiracy. We further

note that count 4 does not charge defendants with conspiring to obstruct a "pending" grand jury investigation. While it does describe the grand jury investigation as having commenced in March 1985, the allegations are sufficiently detailed that there could have been no confusion as to what the government alleged the defendants had done. Accordingly, there was no amendment of or material variance from the indictment. *United States v. Asher*, (Nos. 87-5096 and 875213,[*sic*] slip op. at 28-32, July 20, 1988).[7]

IV.

Conclusion

For the reasons stated above, we will reverse the convictions for obstruction of justice on counts 5 and 6 and affirm those for conspiracy to obstruct justice on count 4. The matter will be remanded to the district court for a

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7 Appellants argue that the verdict on count 4 was undoubtedly based on the jury's finding that the acts alleged in counts 5 and 6 had been committed and that a reversal on counts 5 and 6 thus required a reversal on count 4. We reject this argument. Our reversal on counts 5 and 6 is predicated on the restriction of cross-examination which could have developed information germane to whether there was a grand jury investigation in progress when the appellants allegedly obstructed justice. Certainly the verdict on counts 5 and 6 makes it clear that the acts were committed.

new trial on counts 5 and 6 and for further proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,
Plaintiff

vs.

GILBERT NELSON, JAMES V. GASSARO,
JOSEPH PERRONE and GEORGE SHAMY,
Defendants

Criminal Action
No. 87-41

OPINION

BARRY, District Judge

Extensive press coverage, trumpeting charges of "extortion", followed the arrest and subsequent indictment of Gilbert Nelson, City Attorney for the City of New Brunswick, and James V. Gassaro, Director of Police. In that indictment, on which defendants were found guilty on June 11, 1987 on all counts,[1] defendants Nelson and

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1 Defendant Joseph Perrone's Fed.R.Crim.P. 29 motion was granted on all counts at the close of the government's case. Following the decision of the Supreme Court of the United

Gassaro were charged with conspiracy to commit mail fraud (Count 1) and conspiracy to violate and a substantive violation of the Hobbs Act, 18 U.S.C. § 1951 (Counts 2 and 3). Nelson was also charged with and convicted on two counts of obstruction of justice (Counts 5 and 6), defendant George Shamy with one count of obstruction of justice (Count 5), and Nelson and Shamy together with conspiracy to obstruct justice (Count 4).

Following the return on the verdict, I dismissed the Hobbs Act counts.[2] There is, in my judgment, uncertainty in the Third Circuit as to a major issue of criminal law, i.e. whether, under the color of official right prong of the Hobbs Act, the prosecution must prove that a public official used the power of his office to induce payments not due him or his office. I determined that resolution of this apparent uncertainty should not be decided on a Fed.R. Crim.P. 29 motion because to do so would deny the government any opportunity to obtain review of my decision. I note that as defendants are entitled to justice in this court so, too, is the government and, by virtue of the timing of my action, the government has the right of ap-

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States in *McNally v. United States*, 55 U.S.L.W. 5011 (U.S. June 24, 1987), the government consented to the granting of a new trial to defendants Nelson and Gassaro on Count 1.

2 I reserved on defendants' motions for judgments of acquittal on those counts both at the close of the evidence offered by the government and at the close of all of the evidence. Fed.R.Crim.P. 29(b) does not provide for reserving decision on a motion at the close of the government's case. I advised the parties, however, that I needed further time for reflection on the motions addressed to the Hobbs Act and no objection was voiced. (T. 1508).

peal. If the Court of Appeals resolves the uncertainty I see in favor of the government, the convictions on the Hobbs Act counts can be reinstated.

I. *The Hobbs Act "proofs"*

The government's proofs as arguably relevant to the Hobbs Act counts give new meaning to the word "meager". Richard Malouf, the purported victim yet the driving force behind the Count 1 scheme to defraud the City of New Brunswick, held an option to purchase and a right of first refusal on any offer made to purchase the property he leased from DeAngelis Buick in the City of New Brunswick. When, on November 17, 1982, an offer to purchase the property was made by one Antonio Zappia, Malouf was requested to exercise his right of first refusal within 30 days if he so desired.

In December 1982, Malouf contacted Nelson, a friend of thirty years, and thereafter met with Nelson and Gassaro, another life long friend. Malouf told them that he thought the property would be an excellent location for a City maintenance and repair garage and asked Nelson to ascertain whether the City would be interested. Nelson himself thought it was a good idea because the City had been looking for a location for just such a facility.

> Malouf: I . . . turned to Mr. Gassaro and asked him if he would be interested in going partners with me on this piece of property, because I was -- I had just relocated to the highway and didn't have a lot of extra money to tie up in this piece of property. And I said to him that I thought it would be a good invest-

ment even if the City didn't buy it, because of the location and the renovations going on in the City, that it would be a good investment for us.

Q. Why did you ask Mr. Gassaro to become your partner?

A. Well, Jim and I have been friends a long time, many years, and over the course of the years when we'd bump into each other we would talk about things and once in a while we'd discuss maybe going partners on a project or something for an investment, an office building or something. And I just thought that this was a nice piece of property and it would, you know, being we knew the City, we knew the area, it would be a good investment. And, you know, in my mind I thought I would -- it wouldn't hurt to have Jim as a partner.

Q. And why in your mind did you think it wouldn't hurt to have Jim as your partner?

A. Well, because I thought maybe if -- if the City would consider it, that he might give a little support for it.

Q. Now, did you discuss that explicitly, what you had in your mind with Mr. Gassaro?

A. No, I didn't.

Q. That you thought his position would help?

A. No, I did not.

Q. It was in your mind?

A. Yes.

(Transcript p. 137 at line 6 to p. 138 at line 9.)

Malouf offered the investment to Gasssaro and Gassaro accepted. Malouf told him that they would split whatever profit was realized from the sale of the property and Nelson agreed to check with the City to see whether there was any interest. Nelson did not call Malouf with this information, however, and finally Malouf called him, learning that, indeed, there was some interest.

Encouraged by this news, in January 1983, Malouf reached an agreement with DeAngelis Buick that he would purchase the property for $260,000. Malouf called Gassaro and told him he needed money for a deposit and Gassaro brought him $25.000 he had obtained from Joseph Perrone, his father-in-law. Gassaro was told that Malouf would need the balance of the money before the closing on March 1, 1983 and, before that date, Gassaro and Malouf went to the People's National Bank where each borrowed $20,000 which Malouf then paid at the closing. Gassaro, a purported extorter, thus put his own money into the silent partnership and, together with his father-in-law, put more money in than did the purported victim.

Malouf was disturbed to read articles in the press suggesting that he would realize a windfall profit if the property was sold to the City at an asking price of $330,000

given the price at which Malouf had purchased the property. He again called Nelson, with whom he had not spoken for months, and was told by Nelson that he did not think the City would buy it at that price. Nelson suggested, however, that Malouf attend the next City Council meeting and talk to the Council members. Malouf attended that meeting, made his "sales pitch", and the Council offered to purchase the property for $305,000.

Malouf called Gassaro and asked him whether he wished to sell the property or "sit on it". Gassaro said it made no difference to him and left the decision to Malouf, who accepted the offer. When he advised Gassaro of his decision, Gassaro, who shared office space with Nelson and had been loaning him money for some time, observed "Well, if I sell, Gil will probably put the bite on me for something." (T.159).[3] The contract of sale was signed on March 16, 1983 and the closing was held on May 5, 1983 with Nelson, as City Attorney, representing the City. Nelson deposited the $305,000 purchase price into his trust account and drew check son that account in various amounts, including a check in the amount of $91,695.56 to Malouf. According to the closing statement, $96,695.56 was paid to Malouf and $1,067.50 was paid as a realty transfer fee. The $1,067.50, however, was

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3 The evidence discussed was furnished exclusively by Malouf testifying under a grant of immunity. The government provided no other evidence as to these matters. Thus, for sufficiency purposes, I must accept Malouf's testimony. If I were to reject it, the government would have no explanation whatsoever as to why Malouf became involved with Nelson and Gassaro in the sale of the property. Cf. *United States v. Belgrave*, 484 F.2d 519 (3d Cir. 1973).

not owed as the transaction was exempt from the realty transfer fee and was not paid. According to Malouf, he was shorted these monies by Nelson, who had never asked or been asked to participate in the investment. Malouf did not learn of the shortage until two years later, after the investigation which culminated in this indictment had commenced, when he compared the closing statement to the checks.[4]

The day after the closing, Malouf went to the office Nelson and Gassaro shared for the purpose of paying Gassaro and/or Perrone $25,000 of the profit. In Gassaro's absence, Nelson told Malouf to make the $25,000 check payable to "Tops Paving Co., Inc.". Malouf did so, and Nelson endorsed the check and deposited it into his trust account. It is clear that, unbeknownst to Malouf, Gassaro and Perrone received substantially less than the $25,000 Malouf expected they would receive. At no time before this investigation commenced was Malouf aware that, in the government's word, he had been "cheated" once again by Nelson. (*See*, e.g. T.15, 18). Moreover, the portion of the Tops Paving check which Nelson took for

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4 Accepting Malouf's testimony (and there is no other evidence), Nelson did not obtain the $6,067.50 with Malouf's consent and, therefore, his conduct, while it might well be deemed to constitute theft by unlawful taking or disposition, *see* N.J.S.A. 2C:20-3, or something akin thereto, cannot constitute extortion under color of official right, as will be explained. And, I note, although irrelevant to the Hobbs Act counts, $2,535.76 for water, sewage and taxes which Nelson deducted from the proceeds of the sale for transmittal to the City of New Brunswick was not, in fact, paid to the City until after the investigation commenced, with Nelson causing the City's records to be changed to reflect that that amount had been paid almost two years earlier.

himself diminished the profit which Gassaro and Perrone would have received, not Malouf, and any scheme Nelson had going vis-a-vis those men or the City of New Brunswick was not charged with reference to the Hobbs Act counts.

Malouf and Gassaro consciously sought to deceive the City of New Brunswick as to the fact that Gassaro was a silent partner in the transaction which resulted in the City's payment of $305,000 for a piece of property which Malouf had purchased two months earlier for $260,000. Nelson's true role in this transaction is somewhat less clear. If one credits Malouf's testimony, Nelson defrauded not only the City of New Brunswick, which he was representing in this transaction, but his friends, Malouf and Gassaro, as well. On any view of the objective facts, Nelson's conduct was reprehensible but, in my view, neither his conduct nor that of Gassaro constituted extortion under color of official right.

II. *The Uncertain Law*

The Hobbs Act, which has become an important weapon in the attack on official corruption, proscribes extortion affecting interstate commerce.

> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under 18 U.S.C. § 1951 (b)(2).

The Act is disjunctive and a violation "may be made out by showing that a public official through the wrongful use of office obtains property not due him or his office, even though his acts are not accompanied by the use of 'force, violence or fear' ". *United States v. Mazzei, supra*, 521 F.2d at 645. This case went to the jury solely on that prong of the Act that charges "color of official right."[5]

United States v. Jannotti, 673 F.2d 578 (3d Cir.)(en banc), *cert. denied*, 457 U.S. 1106 (1982), the Third Circuit's latest word on color of official right and the case which has prompted the apparent uncertainty, states that the Hobbs Act "proscribes the 'obtaining of property from another . . . under color of official right', without proof of coercion by the defendant". 673 F.2d at 594, quoting *United States v. Kenny*, 462 F.2d 1205, 1229 (3d Cir.), *cert. denied*, 490 U.S. 914 (1972) and citing *United States v. Mazzei*, 521 F.2d 639 (3d Cir.)(en banc), *cert. denied* 423 U.S. 1014 (1975). Clearly referring to *Kenny* and *Mazzei*, *Jannotti* notes the "suggestion [in our cases] that there need be no inducement or prior request for such payments . . . . " 673 F.2d at 595.

That "suggestion" has prompted uncertainly and, thus confusion. *Kenny* and *Mazzei* suggest, at least to me, that if the Third Circuit were required to rule, it would hold

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5 Count 2, the Hobbs Act conspiracy count, charged extortion both under color of official right and by virtue of "the wrongful use of fear of financial and economic injury to Richard Malouf . . . . " (Ct. 2, §4). At the close of the government's case, when pressed by the court for any evidence of fear of economic loss, the government conceded "there is none" (T. 1447) and that it was proceeding, with reference to Counts 2 and 3, solely on color of official right.

that inducement is, in fact, required in this circuit, the "suggestion" in *Jannotti* notwithstanding. In *Kenny*, the first successful Hobbs Act prosecution for extortion under color of official right, the court approved a jury instruction that payment could be "induced either by" fear or under color of official right. 462 F.2d at 1229. Indeed, when one replaces the ellipses used in *Jannotti* in quoting the above passage from *Kenny* with the words of *Kenny* itself, one finds a recitation of that very jury instruction, i.e. extortion is the "obtaining of property from another with his consent induced either by wrongful use of fear or under color of official right". *Id.* And in *Mazzei*, the word "induced" was treated as a requirement of the color of official right prong of the Act: "[W]e conclude that consent to the payments was induced . . . under color of official right . . . . " 521 F.2d at 645. Extortion under color of official right occurred "so long as [the jury] found that [the extorted party] held, *and defendant exploited*, a reasonable belief that . . . the power in fact of defendant's office included "effective authority". 521 F.2d at 643 (emphasis supplied).

While a reading of *Kenny* and its Third Circuit progeny leaves little doubt that, although the concept of inducement is not developed in any detail, inducement under color of official right is required, no Third Circuit case of which this court is aware has necessitated an explicit ruling or offered a clear directive for in each of those cases, without exception, there has been ample evidence of inducement or some conduct akin thereto. The suggestion in *Jannotti* that there is no such requirement, a suggestion not explained, is, of course, neither a ruling on nor an extension of Third Circuit law as *Jannotti* emphasized the

powerful evidence in that case of inducing activity, thus pointing in two different directions.

The tension between what *Kenny* and *Mazzei* appear to require and the suggestion to the contrary in *Jannotti*, a case in which the record literally reeks of inducement, is not easily susceptible of resolution and perhaps explains the government's floating Hobbs Act theory which finally came to rest when it concluded that the suggestion in *Jannotti* should be followed. The government's definition of official right, as articulated in its opening statement, was "nothing more than [giving] money to someone simply because they [hold] an office." (T. 7). Almost immediately, the theory shifted: "Nothing more than . . . defendants . . . getting money and property interests, in this case silent partnership interests, in a piece of property by virtue of the fact that they were in a position to use their city office to make a deal happen" (T. 7-8). A further shift: color of official right became "a hope that they will do something . . . using their public offices . . . which would involve the misuse of office" (T. 1474). And while, early on, the payment of money had to be "included under color of official right" (T. 7), the subject as well of one of the government's requests to charge, that theory was later withdrawn in light of the "suggestion" in *Jannotti*.[6]

The bare majority of federal courts of appeals that have discussed this issue hold that all a public official need do for there to be a violation of the Act is to receive

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6 This case went to the jury in accordance with the government's request, and over defense objection, pursuant to *Jannotti*'s suggestion that inducement is not required. There was utterly no evidence of inducement here unlike the cases of which this court is aware.

payments not due him under the law, and that no act of inducement need be committed.[7] In the view of these courts, of which the Third Circuit is popularly believed to be one, the fact of the official's position and authority in and of themselves exert a coercive force on one making the payment.

The Second and Ninth Circuits, consistent, at least to me, with established precedent in this circuit, clearly required inducement or demand under color of official right. In persuasive and well reasoned decisions, those courts focus on the plain language of the Act itself and the bizarre results which can obtain if inducement is read to refer to everything in the statute *but* color of official right.

The Second Circuit examined *en banc* in *United States v. Grady*, 742 F.2d 682 (2d Cir. 1984), the definition of extortion under the Hobbs Act. Necessary for a conviction under color of official right is proof that the public official induced the payments, i.e. evidence sufficient to permit "the jury to find that the public official did something, under color of his office, to cause the giving of benefits" - "some misuse of office to obtain benefits". *Id.* at 692 93. The court recognized that, as long as his act creates the impression that payments are expected, inducement can be subtle: "Proof of a request, demand or solicitation, no matter how subtle, will establish a wrongful use of public office; proof of a *quid pro quo* would suffice as would other circumstantial evidence tending to show that the public

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7 *See United States v. Swift*, 732 F.2d 878 (11th Cir. 1984), *cert. denied* 105 S.Ct. 905 (1985); *United States v. Hedman*, 630 F.2d 1184 (7th Cir. 1980), *cert. denied* 450 U.S. 965 (1981) and *United States v. Jarabek*, 726 F.2d 889, 904 n. 16 (1st Cir. 1984).

official induced the benefits." *Id.* at 691-92. The extortion must "begin . . with the public official, not with the gratuitous actions of another" and "when a public official merely accepts unsolicited benefits knowing that they were given because of his public office.", it is not extortion. 813 F.2d at 684, 691. Absent inducement, observed the *O'Grady* court, public officials would neither be protected from an overbroad statute nor an impermissible degree of prosecutorial discretion and the Hobbs Act would be transformed into a professional ethics standard governing public officials. 813 F.2d at 687.

The Ninth Circuit, in *United States v. Aguon*, 813 F.2d 1413 (9th Cir. 1987), while not in so many words parting with that circuit's construction of the Hobbs Act as to require inducement, *see United States v. McClelland*, 731 F.2d 1438, 1440 (9th Cir. 1984), *cert. denied*, 472 U.S. 1010 (1985), required a demand on the grounds of office for an act to be under color of official right. While "no threat and no specific inducement need be made . . . a demand (which some people think to be a form of inducement) is necessary."[8] 813 F.2d at 1416. However subtly the official communicated, a demand was necessary to constitute common law extortion, and Congress has not indicated any intention to eliminate the common law requirement. *Id.* While noting differences between its conclusion and some language in *O'Grady* on the main points, most particularly that the jury must find "that the public official did something, under color of his office, to cause the giv-

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8 This somewhat tortured construction was presumably dictated by the *Aguon* panel's successful attempt to avoid *en banc* consideration of the issue.

ing of benefits." *Id.*, quoting *United States v. O'Grady, supra*, 742 F.2d at 693.

Without pausing to analyze why the language of the Hobbs Act and the common law dictate that inducement or demand should be the anchor of color of official right, it is clear that without that anchor, official right goes out to sea, bizarre results obtain, and uncertainty again rears its head. For example, the Third Circuit has approved a jury instruction that extortion under "color of official right is defined as the taking by a public official of money not due him or his office . . . . " *United States v. Cerilli*, 603 F.2d 415, (3rd Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980). *See United States v. Jannotti, supra*, 673 F.2d at 595. This expansive language, absent an inducement requirement or stripped from its moorings in a case in which there was "overwhelming" proof of coercion, 603 F.2d at 425, would cover even a gift where no *quid pro quo* was either sought or believed to be possible because a gift is not "*due* him or his office" (emphasis supplied). It would cover any pocketing of money by a public official as by larceny or embezzlement committed surreptitiously.

But it would defy logic to penalize the mere receipt of a gratuity, effectively a lesser included offense of bribery, the same as the greater offense. *Cerilli* notes that "The receipt of money . . . is not inherently wrongful." 603 F.2d at 419-20. And certainly more than a gift or a mere taking is required if the foundation of the Hobbs Act in the Anti-Racketeering Act of 1934 and the New York Criminal Code as construed by the New York courts in 1946, when the Hobbs Act became effective, is not to be ignored. *See United States v. Agnes*, 753 F.2d 293, 297 (3d Cir. 1985).

Certainly, too, more than a gift or a mere taking is required if state and local officials are not to face penalties potentially ten times greater than federal officials, under federal law, for identical conduct. *See* 18 U.S.C. § 201(g) (federal official who receives money "for or because of any official act performed or to be performed" is subject to imprisonment for two years).[9] I, for one, will not attribute such an intent to Congress. Rather, with Hobbs already on the books, the enactment of the "anti-gratuity" statute in 1962 was "a clear indication that Congress did not believe that the Hobbs Act prohibits such conduct." *United States v. O'Grady, supra*, 742 F.2d at 691. Beyond that, of course, the enactment of that statute, which eliminates common law concepts, is a clear message that Congress did not intend to eliminate the common law core when in the Hobbs Act it employed the common law phrase "under color of official right". *See United States v. Aguon, supra*, 813 F.2d at 1417. And so there is uncertainty and, indeed, confusion when one sees color of official right defined, without more, as a taking of money not due the public official or his office. What the "more" is, absent inducement or something akin thereto, is not entirely clear.

Mazzei teaches that there must be a showing that a public official "through the wrongful use of office obtains property not due him or his office . . .". 521 F.2d at 645. But how is one's office "wrongfully used"? Certainly, wrongful use of office means more than the mere receipt of money not due the official or his office, although the

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9 The Hobbs Act provides penalties of up to twenty years incarceration and a $10,000 fine. 18 U.S.C. § 1951(a).

receipt of money is, of course, a necessary element of the crime. The phrase "wrongful use" - and the word "obtain" - implies an action component and a defendant has to use his office to obtain money.[10] Certainly, too, the facts of those cases which speak in terms of "wrongful use of office" describe conduct from which inducement is readily inferred. The wrong under the Hobbs Act, after all, is the manner in which that money is obtained and the defendant must, in some manner, use his employment to extort. *United States v. Cerilli, supra*, 603 F.2d at 419-20 and n. 6.

What becomes fairly clear from a close reading of the cases is that whether it is called "inducement", "exploitation", "use of office", "demand", "coercion" (explicit or implicit), or whatever, there must be a causation component for there to be extortion, i.e. something done by an official which causes one to knowingly part with money or property. It also becomes fairly clear that the disagreement among courts as to the parameters of what "something" is required is more apparent that real.

Even if passive acceptance of a bribe - an "unexpected bribe", as *Jannotti* describes it - would constitute a violation of the Hobbs Act, a conclusion which the cases before the Third Circuit have not required it to draw, *see United States v. Jannotti, supra*, 673 F.2d at 595, implicit in

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10 In the Hobbs Act, Congress used the word "obtaining" in the sentence preceding the definition of extortion to define robbery - "the unlawful taking or *obtaining* of personal property" against another's will (emphasis supplied). If Congress meant the words "taking or obtaining" to include passive acceptance of property, it would not have used those words to define the active offense of robbery.

accepting a bribe is an understanding that certain action or inaction is sought in exchange for payment with the receipt of payment effectively compliance with a demand. A bribe by definition comprehends the payment of money based on a belief on the part of the payor that payment is the *quid pro quo* for the taking or withholding of official action, a belief which is exploited or subtly induced by the payee upon acceptance of payment with knowledge of the reason therefor. As Judge Easterbrook put it, "The prosecutor needed to show that [the 'victim'] paid because Murphy was willing to alter his official acts". *United States v. Murphy*, 768 F.2d 1518, 1535 (7th Cir. 1985).

Stated somewhat differently, the public official even in the bribe situation must obtain property knowing that it is consideration for the exercise of his official duty. So viewed, of course, bribery and extortion are not mutually exclusive because it is of no matter whether the "victim" is willing or unwilling and of no matter that the purported "victim" himself instigated the corrupt opportunity.[11]

There was no evidence that either official used his office to extort money from Malouf. Nelson, who commit-

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11 It appears that the United States Sentencing Commission views extortion under color of official right as mandating what has been traditionally thought of as an extortionate act - an inducement, a demand - by the official. In the Sentencing Guidelines and Policy Statements dated April 13, 1987, the Commission explains that the panoply of conduct that may be prosecuted under color of official right "varies *from* a city building inspection who *demands* a small amount of money from the owner of an apartment building to ignore code violations, *to* a state court judge who *extracts* substantial interest-free loans from attorneys who have cases pending in his court . . . ." (emphasis supplied). There is a *victim*. *See* Commentary to Section 2C 1.1 at 2.28.

ted a crime akin to embezzlement, obtained no money from Malouf with Malouf's consent. By definition, therefore, his conduct did not constitute "extortion". Gassaro had no intention of obtaining money from Malouf but, rather, Malouf and Gassaro together intended to obtain money from the City of New Brunswick.[12] While this

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12 The sale to the City made possible the profits obtained. But even if one assumes that Gassaro's profits were in fact obtained from Malouf because Malouf had made Gassaro's investment possible, there is no evidence that the money Gassaro obtained was the result of any "exploitation [by him] of [Malouf's] reasonable belief" that the power of Gassaro's office included the effective authority to assure that the sale went through. *United States v. Mazzei, supra*, 521 F.2d at 643, 645. And, of course, there is no evidence that Malouf parted with money because of any belief that Gassaro could or would expedite a favorable outcome or had any intention of doing so, and no evidence that unless Malouf consented to pay, Gassaro could or would become involved in the matter in a manner less likely to produce a favorable result. And, I note, if the "only" in *United States v. Hedman, supra*, 630 F.2d at 1195, is the law of this circuit, given the approving quotation in *Jannotti* at 595 of *Hedman*'s statement that "The Government is merely required to prove that a public official obtained money to which he was not entitled and which he obtained *only* because of his official position" (emphasis supplied), there is no evidence of that here. Even if one assumed that Malouf offered the "investment" to Gassaro in part because of the hook that he hoped Gassaro's official position could provide, Gassaro did not obtain those profits *only* because of his official position but also obtained those profits because of his life long friendship with Malouf and because of the fact that he, and his father-in-law through him, invested money and invested even more than Malouf. That the evidence disclosed, at best, a combination of reasons for Gassaro's participation is presumably the reason why the government resisted a jury instruction that money was obtained "only" because of his official position.

conduct did not constitute extortion, it was the underpinning of the government's theory on the mail fraud count - a scheme to defraud the City - a theory, a contention, whose ultimate resolution must await the new trial on Count 1.

The Hobbs Act counts are hereby dismissed. The court will file an appropriate order.

s/ MARYANNE TRUMP BARRY
U.S.D.J.

Dated: August 3, 1987

APPENDIX C

(After a brief recess court resumed).

THE COURT: Be seated, please. My summer interns, are they staying. You're going to enjoy this.

MISS FLEMING: Judge, did you ever find out what that noise was?

THE COURT: They're doing a lot of repair work around, that's all it was. I don't know if there was some correction I was supposed to make.

MR. RUOTOLO: Judge, I think if you just state that attorney's recollections are different and that you should be guided by your own —

THE COURT: I have that in the charge.

MR. RUOTOLO: — which is — I think I'm protected.

THE COURT: When are you going through the exhibits?

MISS FLEMING: We'll do it right after the charge.

THE COURT: The indictment as redacted agreeable to both sides?

MR. RABNER: Miss Costello has a copy. I did the redactions as Your Honor suggested.

THE COURT: All right. And the verdict sheet is agreeable to both sides?

MISS FLEMING: Yes, Judge.

THE COURT: All rise.

(Jury enters).

THE COURT: Be seated, please.

Ladies and gentlemen, I had asked you yesterday to plan on staying later today. I'll have more to say about

that later. I just tell you in advance that I expect my charge to go beyond your appointed time, in case you are wondering.

I tell the courtroom, everyone in the courtroom, that the courtroom is locked during the giving of the charge. No one is permitted out or in. So if there is anyone who wishes to leave, they must do so now.

Lock the courtroom please, Miss Costello.

(Courtroom seated).

THE COURT: The purpose that, ladies and gentlemen, is to keep your attention focused on what I now will tell you. You have seen how important the case is to all the parties involved, and you have seen the efforts that have been put into their presentation to you. You should not be distracted by people entering the courtroom or leaving the courtroom, because it is their work which will now be judged against the instructions that I will give you.

I say primarily as well that all of us here thank you for your service, your attentativeness, [*sic*] and your dedication. After this is over I will thank you again.

Ladies and gentlemen of the jury, now that you have heard all of the evidence in this matter and you have heard the final arguments of counsel, it becomes the duty of the court to instruct you as to the law which is applicable in this case. You will then retire and commence your deliberations. I ask you to give these instructions your closest attention because it is these instructions against which you must judge the evidence that has been received.

First, let me give you a few general instructions, each as important as the more specific instructions to which I will shortly turn my attention. Certain of these general

instructions will be familiar to you, for, indeed, I gave them to you when we commenced trial just about two weeks ago.

Under our system, the court and the jury have totally separate and distinct functions. Each is supreme in its own sphere. The court has the responsibility for safeguarding both the rights of the accused and the interests of the public and the administration of justice. It is the function of the court to preside over the trial and to see that the trial is conducted in accordance with the established rules of evidence. You are the judges too, the judges of the facts. It is for the court to make decisions on questions of law that are presented from time to time during the course of the trial, and to instruct you, the jury, with respect to the principles of law which control the case.

Now, counsel have quite properly in their closing statements referred to some of the governing rules of law. If, however, any difference appears between the law as stated by counsel and that as stated by the court in these instructions, you are to be governed by my instructions and not by what counsel have said regarding the law which is applicable. It is your duty as jurors to follow the law as stated in the instructions of the court, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to be concerned with the wisdom of any rule of law stated by the court, regardless of any opinion you may have as to what the law ought to be. Indeed, it would be a violation of your sworn duty to base a verdict upon any other view of the law than is given in the instructions of the court, just as it would be a violation of

your sworn duty of judges of the facts to base a verdict upon anything but the evidence in the case.

Now, nothing I say in these instructions and nothing I may have said or done at any time during the trial is to be taken as an indication that I have any opinion about the facts of the case or what that opinion is. Is is not my function to determine the facts, it is yours. Justice through trial by jury must always depend upon the willingness of each individual juror to speak the truth as to the facts from the same evidence presented to all of the jurors and to arrive at a verdict by applying the same rules of law as given in the instructions of the court.

Now, you are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole. Each part or phase of the instructions is to be considered and applied together with all other parts and phases of the instructions. In other words, you must not pick out some particular instruction alone or some particular portion of an instruction and overemphasize and apply it without considering and keeping in mind all of the other instructions given you with regard to this case. You should construe each of the instructions in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. The order in which the instructions are given have no significance and is no indication of their relative importance.

Our system of law does not permit jurors to be governed by bias, sympathy, prejudice, or public opinion. The United States, the defendants, and the public, expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the court, and reach a just verdict regardless of the consequences.

Now, trials are sometimes very quiet and every so often they heat up, and sometimes they heat up because lawyers feel, and quite rightly so, that they have to make objections on behalf of their clients to certain questions or certain actions taken by the court. That is a perfectly proper exercise on the part of any lawyer in this case. I wholeheartedly approve of it and don't want you, in your capacity as jurors, to hold it against any lawyer in this case because he or she may have objected vigorously either to a question posed by his adversary or to an action on the part of the court. That attorney is doing his duty.

Similarly, during the trial you have heard testimony that Assistant U.S. Attorney's or federal agents have interviewed some witnesses and that defense attorneys have interviewed some witnesses. I charge you that all of these persons had a right and a duty to conduct those interviews. And they would have failed in their duties if they had not questioned the witnesses during their preparation for this trial. Indeed, it would be negligent on the part of any lawyer not to interview, or attempt to interview a witness whom he called to testify.

You have seen counsel confer with the court on a number of occasions at what we call "side bar conferences." Again, as I indicated to you before, these are for the purpose of discussing questions of law, and unless I advised you what you should do as a result of these conversations, you should not speculate as to what took place. And the fact of those discussions obviously should play no part in your deliberations. And I remind you that any questions as to which an objection was sustained by the court, and any answer or statement or testimony which was ordered stricken by the court must be entirely disregarded.

Similarly, you may not draw any inference from an unanswered question or speculate as to what the answer may have been. And to the extent I have given what we call "limiting instructions" during the course of the trial, you are obliged to follow those instructions. I give you one now. Any testimony as to Mr. Perrone's acts is to be stricken and is not to be considered against defendants Nelson, Gassaro, and Shamy.

Statements and arguments of counsel are not evidence in the case but are only for the purpose of persuading you as to counsel's respective points of view. Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; all exhibits received in evidence, regardless of who may have produced them; and all the facts which may have been admitted or stipulated by the parties. In this connection, you have been told that the attorneys for the United States and the attorneys for the defendants have entered into stipulations about certain facts in this case. A stipulation is an agreement between counsel that a fact or conditions exists or existed. When a stipulation is entered, you must, unless otherwise instructed, accept it as evidence and regard that fact as being proven.

Now, regardless of what counsel has said in recalling the facts of this case, I want to stress in the strongest possible terms that it is your recollection of the facts which in the final analysis should guide you in carrying out your function as judges of the facts. In arriving at your verdict you are to consider all of the evidence as you recall it, and you are to give that evidence the degree of weight that you believe it is entitled to receive.

In reaching your decision in this case, there are, generally speaking, two types of evidence which you may consider. One is what we call "direct evidence," such as the testimony of an eyewitness to the alleged offense or to some part thereof. The other is "circumstantial evidence," such as the proof of a chain of circumstances pointing to the commission of the offense.

Direct evidence is where a witness testified as to what he or she saw, heard, or observed, something which comes to one by virtue of one's senses. Circumstantial evidence is evidence of facts and circumstances from which one may infer connected facts which reasonably follow from the common experience of mankind. Stated somewhat differently, circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts, which have a logical tendency to lead the mind to a conclusion that such a fact exists. Circumstantial evidence, if believed, is of no less value than direct evidence. For in either case, you must be convinced beyond a reasonable doubt of the guilt of a defendant.

Although this definition of circumstantial evidence may sound complicated to you, I will give you a very simple example so you will know what I am talking about. If you were sitting in the courtroom and the shades were drawn when you came in this morning, and it was a beautiful sunny day, and someone walked in that door with an umbrella that was wet and a raincoat that was dripping, you would, from circumstantial evidence, surmise that it was now raining outside. That is all that circumstantial evidence is. It is drawn on a fair inference from facts based upon your common everyday experience.

Again, I emphasize to you that the law makes no distinction between direct and circumstantial evidence, but

simply requires that before convicting a defendant, you must be satisfied of a defendant's guilt beyond a reasonable doubt, on the basis of your appraisal of all of the evidence.

And I might say also in considering the evidence, you are not limited to the bald statements of the witnesses or the bald appearance of particular exhibits. To the contrary, you are permitted to draw from the facts that you find to have been proved such reasonable inferences as seem justified to you, again in the light of your own experience and common knowledge.

An inference may be defined as a deduction or conclusion which reason and common sense lead you to draw from the evidence, again, deducing that it is raining outside because you see someone in here with a wet raincoat and umbrella.

When considering the evidence, I would like to give you certain guidelines for judging the credibility of witnesses. First of all, as I indicated before, you are the sole judges of the facts. And, in particular, the sole judges of the credibility of the witnesses and the weight their testimony deserves. It is for you to determine how much of that testimony is credible or how much of it is not. You may find that a witness's testimony wholly conforms to the facts as you have found them to be. Similarly, you may find that the testimony of a witness fails to conform to the facts as they occurred because he or she is intentionally telling a falsehood; because he or she did not accurately see or hear that about which he testified; because his or her recollection of the event to which he is testifying is faulty; or because he or she has not expressed himself clearly in giving that testimony.

There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you determine for yourselves the reliability or unreliability of statements made to you by others. The same tests that you use in your everyday dealings are the tests which you apply in your deliberations; the interest or lack of interest of any witness in the outcome of this case; the appearance or the manner in which the witness gives his or her testimony on the stand; that is, his candor, his evasion, if either appeared, his willingness or reluctance to answer; the inherent believability or lack thereof of the testimony; the opportunity that the witness had to observe the facts concerning that which he testified to; the probability or improbability of the witness's testimony when viewed in light of all the other evidence in the case; the facts that at some other time the witness had said or done something or has failed to say or do something which is inconsistent with his present testimony are all items to be taken into consideration in determining the weight, if any, you will assign to that witness's testimony.

Let me be more specific. Consider each witness's intelligence, motive, and demeanor on the witness stand. Consider the witness's ability to observe the matters to which he or she has testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relationship the witness may bear to either side of the case, the manner in which the witness might be affected by the verdict, and the extent to which, if at all, the witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently. An innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of the discrepancy, always consider whether it pertains to a matter of important or unimportant detail and whether the discrepancy results from innocent error or intentional falsehood. Again, in this respect you are expected to use your own good common sense in considering all of the facts and circumstances in evidence in determining which witnesses are worthy of belief.

Should you believe that any witness has willfully, knowingly, or intentionally given or made a false statement, or has testified falsely relating to or concerning a material fact in this case, then you, as jurors, may reject all or any portion of the testimony given by that witness. You do not have to reject all of his or her testimony, but you may certainly do so. On the other hand, you may certainly credit that part of the testimony which you believe is true and disregard that part which you think is false. After judging each witness, you will give the testimony of that witness such credibility, if any, as you think it deserves.

A few more instructions in this regard. It is, as I noted earlier, proper for you to consider the interest which a witness has in the outcome of a case. All witnesses are to be judged by the same standards. But in determining the credibility of a witness, his or her interest in the outcome of the case, or any demonstrated bias toward or against a

defendant or the United States is certainly a matter you are entitled to take into consideration.

A witness may, for example, have provided evidence against the defendant for a promise from the United States of some personal advantage, such as immunity from punishment. Richard Malouf was such a witness. Similarly, defense witness Miss Madama testified under court ordered immunity. Witnesses in this position may be entirely truthful when testifying. Still, you should consider the testimony of these witnesses with greater care and caution that the testimony of other witnesses, and should consider whether the testimony may have been colored to further the witness's own interest.

If you determine that testimony was colored because of promises made or biased toward or against the defendant or the United States, you may weigh — you must weigh that testimony with great care. I do not mean to suggest that a witness who has an interest in the outcome of the case may not be telling the truth despite his or her interest. But you may consider that fact in determining what weight to give to his or her testimony.

Conduct of a defendant, including statements knowingly made and acts knowingly done upon being informed that a crime has been committed, or upon being confronted with a criminal charge, or upon being questioned about crimes may be considered by you in the light of all the other evidence in the case in determining guilt or innocence. A statement or act is knowingly made or done if made or done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

When a defendant voluntarily and intentionally offers an explanation or makes a statement tending to show his

innocence, such as he never did a particular act, and this explanation or statement is later shown to be false, you may consider whether the circumstantial evidence points to the defendant's consciousness of guilt. Ordinarily, it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his or her innocence.

Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt, and the significance to be attached to any such evidence are matter exclusively within the province of the jury.

In evaluating the evidence, you should give to each piece of evidence, including the testimony of witnesses, the weight you believe it deserves in light of these instructions. The weight of the evidence is not necessarily determined by the amount of evidence or the number of witnesses presented by either side. You should consider all of the facts and circumstances in evidence to determine which of the evidence and which of the witnesses are worthy of greater credence.

Witnesses called by the prosecution are to be judged by no different standard than witnesses call by any defendant. No greater or lesser weight is to be given to their testimony simply because the witness is called to testify by the prosecution.

Now, I instruct you that the law does not require a defendant in a criminal action to take the witness stand and testify and no presumption of guilt may be raised, no inference of any kind may be drawn from the failure of a defendant to testify and you should not discuss that fact. The law never places upon a defendant in a criminal case

the burden or duty of calling any witness or of producing any evidence.

Ladies and gentlemen, I would now like to instruct you as to the burden of proof and the presumption of innocence. As I stated earlier, the defendants in this case has been charged by way of indictment with the commission of certain violations of law. The fact that a defendant has been indicted permits no inference of guilt. The indictment is simply a formal method of accusing a person of a crime. It is not and cannot be considered as evidence in any degree or of any kind against the defendant. And I note that although you will have a copy of the indictment in the jury room, it is given to you solely to enlighten you as to the charges against the defendants and to aid you in your deliberations as you go through the charges.

After the indictment was returned, the defendants pleaded not guilty. By pleading not guilty, they denied the accusations contained in the indictment. It is then the burden of the Government to prove the defendants' guilt beyond a reasonable doubt.

Now, under our law, a defendant is presumed to be innocent. Thus, a defendant, although accused, begins a trial with a clean slate, and continues through trial presumed to be innocent. The law permits nothing but legal evidence presented before the jury to be considered in support of any charge against an accused.

So I instruct you that the presumption of innocence alone is sufficient to acquit a particular defendant, unless you, the jurors, are satisfied beyond a reasonable doubt of his guilt after careful and impartial consideration of all of the evidence in the case. It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt.

Now, what does that mean? A reasonable doubt is a doubt based upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act. It is not necessary for the United States to prove the guilt of a defendant to a mathematical certainty or beyond all possible doubt. Proof beyond a reasonable doubt must, however, be proof of such convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

A reasonable doubt may arise not only from the evidence before you but from a lack of evidence. Reasonable doubt, however, is not a vague or hypothetical doubt. It is not an excuse to avoid the performance of an unpleasant duty. It is not the normal sympathy which one human being holds for another. Vague, speculative or imaginary qualms or misgivings are not reasonable doubt.

Now, the burden is always on the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to the defendant. For the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. If you, the jury, after a careful and impartial consideration of all of the evidence in the case have a reasonable doubt that a defendant is guilty of a charge, you must acquit. If, however, you are convinced that a defendant has been proved guilty beyond a reasonable doubt, you may find the defendant guilty.

Count 1 charges that defendants Nelson and Gassaro conspired to use the mails in furtherance of a scheme to defraud in violation of Title 18, United States Code, Section 371. Count 1 charges that these defendants, and oth-

ers, entered into an illegal agreement to defraud the City of New Brunswick and the citizens and taxpayers of the City of their right to the honest and loyal services of their city officials and to obtain money by false pretenses and to use the mails in furtherance of this scheme.

Count 2 charges that defendants Nelson and Gassaro conspired and agreed to obstruct interstate commerce by extortion. That is, by obtaining money, hidden partnership interests, and other things of value from Richard Malouf, with Malouf's consent, induced under color of official right. This count alleges that these defendants violated the conspiracy section of the Hobbs Act statute, Title 18, United States Code, Section 1951.

Count 3 charges defendants Nelson and Gassaro with the substantive offense of committing or aiding and abetting the commission of extortion, in violation of Title 18, United States Code, Sections 1951 and 2.

Count 3 specifically charges those defendants with [a] affecting interstate commerce by extortion, that is, by obtaining money or property interests from Richard Malouf with his consent induced under color of official right.

Count 4 charges defendants Nelson and Shamy with conspiracy to obstruct justice in violation of Title 18, United States Code, Section 371. More specifically, Count 4 charges that defendants Nelson and Shamy conspired and agreed to conceal, that defendant Nelson had unlawfully diverted funds from Richard Malouf and the City of New Brunswick by altering and fabricating documents, and causing these altered and fabricated documents to be turned over to federal law enforcement officials during the course of a federal grand jury investigation.

Count 5 charges defendants Nelson and Shamy with the substantive crime of obstruction of justice and aiding

and abetting said obstruction of justice, in violation of Title 18 United States Code, Sections 1503 and 2.

Specifically, Count 5 charges that defendants Nelson and Shamy obstructed justice by causing a fabricated document, namely, the April 16th, 1983 letter, to be produced to representatives of federal law enforcement agencies during the course of a federal investigation by said law enforcement agencies and the grand jury.

And finally, Count 6 charges defendant Nelson with another count of obstruction of justice, namely, by causing an altered closing statement to be produced to federal law enforcement representatives during the course of a federal investigation by said federal law enforcement agencies and a federal grand jury.

Each offense, and the evidence pertaining to it, and to each defendant, should be considered separately. The fact that you may find one or more of the defendants guilty or not guilty of one of the offenses charged should not control your verdict as to any other offense or any other defendant charged.

Miss Costello, is the air-conditioner on? Please turn the air-conditioner on.

Now, let me instruct you in some more detail on each count.

Count 1 initially describes the defendants and other relevant persons and entities and explains what is alleged to be the scheme to defraud.

As I have told you, you will have the indictment in the jury room, and I will not read those sections now. Rather I will only ready what we refer to as the charging paragraphs of the indictment.

Count 1 alleges that from, "between in or about 1982 until in or about the date of this indictment, at New Brunswick in the District of New Jersey and elsewhere, the defendants Gilbert Nelson and James Gassaro, and others known and unknown to the grand jury, did knowingly and willfully combine, conspire, confederate and agree to devise a scheme and artifice to defraud the City of New Brunswick and the citizens and taxpayers of the City of New Brunswick of their right to the honest and loyal services of their public officials and of their right to have the business and affairs of the City of New Brunswick conducted honestly and free from fraud, corruption, and conflict of interest, and to obtain money and property by means of false and fraudulent pretense, representations, and promises, and that they cause or caused to be used the United States mails for the purpose of executing said scheme and artifice to defraud or attempting to do so contrary to the provisions of Title 18, United States Code, Sections 1341 and 2.

"It was part of said conspiracy that defendants Nelson and Gassaro would conceal their interests in and knowledge about the property from the members of the City Council and the taxpayers and citizens of the City of New Brunswick.

"It was further part of said conspiracy that defendants Nelson and Gassaro and others would not report their profits on this transaction to the appropriate tax authorities.

"It was further part of said conspiracy that defendants and others would conceal and make misrepresentations about their involvement and interests on this transaction to representatives of federal law enforcement agencies.

"It was further part of said conspiracy that defendants and others would take steps designed to conceal their illegal activities by, among other means, the fabrication and altering of the documents and the submission of these documents to representatives of federal law enforcement agencies and to a grand jury investigating the facts and circumstances of this case. In furtherance of said conspiracy and to effect the objects thereof, the following overt acts were committed:

1) In or about November 1982, the defendant Gilbert Nelson had a conversation with Richard Malouf concerning the property.

2) On or about December 2, 1982, the defendants and other caused a letter to be sent through the United States mails to counsel for DeAngelis Buick, Inc. concerning the property.

3) On or about December 13th, 1982, the defendants and others caused a letter to be sent through the U.S. mails to counsel for DeAngelis Buick, Inc. concerning the property.

And continuing on or about January 14th, 1983, the defendants and other caused a letter to be sent through the U.S. mails to defendant George Shamy concerning the property.

In or about February 1983, defendant James Gassaro gave Richard Malouf $20,000 towards the purchase of the property.

In or about January '83 defendant Gilbert Nelson proposed to the New Brunswick City Council that the City purchase the property for approximately $330,000.

On or about February 10th, 1983, Richard Malouf sent a letter to the City of New Brunswick offering the property for sale for $330,000.

On or about May 5th, 1983, defendant Gilberty [*sic*] Nelson represented the City of New Brunswick at the closing of the Malouf property.

On or about May 6th, 1983, defendant Gilbert Nelson drafted a fictitious invoice of $25,000 on the letterhead Tops Paving Company, Inc.

On or about May 6th, 1983, defendant Gilbert Nelson deposited the check payable to Tops Paving Company, Inc. into his trust account.

On or about May 6th, 1983, defendant Gilbert Nelson issued checks to City officials and other from his trust account.

On or about April 15th, 1983, defendant Gilbert Nelson submitted his 1982 disclosure statement to the City of New Brunswick which statement failed to disclose defendant Gilbert Nelson's interest in the property.

On or about April 18, 1984, defendant Gilbert Nelson submitted his 1983 disclosure statement to the City of New Brunswick which statement failed to disclose the defendant Gilbert Nelson's interest in the property.

On or about April 12th, 1983, defendant James V. Gassaro submitted his 1983 disclosure statement to the City of New Brunswick which statement failed to disclose defendant James V. Gassaro's interest in the property.

And finally on or about April 9th, 1984, defendant James V. Gassaro submitted his 1983 disclosure statement to the City of New Brunswick which statement failed to disclosure the defendant James V. Gassaro's interest in the property."

The statute setting forth the crime of conspiracy, and, I'm no longer reading from the indictment, which is charged in the first count, is Title 18, United States Code,

Section 371, which reads: "If two or more persons conspire to commit any offense against the United States, and one or more of such persons do any act to effect the object of the conspiracy, each shall be guilty of an offense against the laws of the United States." This statute creates a separate and distinct crime from any other crime charged in the indictment. I tell you that the same conspiracy statute is charged in Count 4. Each of these conspiracies, however, is charged to have a different object.

Further, Count 2 charges a different conspiracy statute, namely, conspiracy to violate the Hobbs Act, which has slightly different elements and which I will explain to you later. The basic general principles of law, as I will explain them to you, apply to all three of these conspiracy counts.

There are three essential elements of the crime of conspiracy charged in Counts 1 and 4 of the indictment.

First, that the conspiracy described in the indictment was willfully formed and was existing at or about the time charged;

second, that the defendant willfully became a member of the conspiracy;

and third, that after the conspiracy was formed, one of the conspirators knowingly committed at least one of the overt acts charged in the indictment in furtherance of some object or purpose of the conspiracy.

If you find beyond a reasonable doubt from the evidence in the case that the conspiracy charged in the indictment existed, and that during the existence of the conspiracy one or more of the conspirators knowingly performed one or more overt acts in furtherance of some object or purpose of the conspiracy, then proof of the con-

spiracy offense charged is complete, and it is complete as to every person which you find was a member of the conspiracy at the time the overt act or acts were committed, regardless of which conspirator committed the overt act.

Now, a conspiracy is nothing more than a combination or agreement by two or more persons, by concerted action, to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. In other words, a conspiracy is a kind of partnership in crime in which each member becomes the agent of every other member. The very essence of a conspiracy is a unity of purpose or a common design to do something that the law forbids.

In this case as alleged in Count 1, the purpose or plan alleged is that defendants Nelson and Gassaro, conspired to commit mail fraud by agreeing to devise a scheme to defraud the City of New Brunswick, its citizens and taxpayers, and to obtain money by means of false pretenses and by using the United States mails or causing the mails to be used to executive their scheme.

In Count 4, the purpose or plan alleged is that defendants Nelson and Shamy agreed to obstruct justice or endeavored to obstruct justice by fabricating documents, altering records, and producing fabricated and altered documents to federal law enforcement officers while a grand jury proceeding was pending.

The first issue for you to decide is whether or not the agreement in each of these counts existed. When I speak of an "agreement," I do not mean that the United States is required to prove that the co-conspirators sat around a table and entered into a solemn pact either orally or in writing. Nor do I mean that the United States must prove

that each of the defendants met and discussed with each other all of the details of the plan or all of the means by which the conspiracy's objects would be carried out or all of its illegal objects. Indeed, it would be extraordinary if there were or had been such a formal meeting or written document or even a specific oral agreement.

Conspirators usually do not reduce their agreements to writing or acknowledge them before a notary public, nor do they publicly broadcast their plans. A conspiracy is, by its very nature, secret in its origins and in its execution.

It is sufficient that the Government proves to you beyond a reasonable doubt that the defendants in some way or manner came to a mutual understanding to try to accomplish the unlawful goals alleged in the indictment. Here, in Count 1, the unlawful object was the use of the mails in furtherance of the scheme to defraud. In Count 4, the unlawful objective was to attempt and endeavor to obstruct and impede justice.

The United States need not prove that each defendant knew the exact function of each and every other conspirator to establish that there was a mutual understanding or agreement. It is sufficient if the United States proves with respect to a particular defendant that he knowingly associated himself with an unlawful enterprise, and that he knew that the success of the enterprise required, in part, the assent and participation of others, some of whom might be known to him.

In determining whether the charged conspiracy existed, you should consider the actions and declarations of all of the alleged participants. An illicit agreement may be inferred from all of the circumstances and the words and conduct of all of the alleged participants. The crime of

conspiracy is seldom susceptible of proof by direct evidence. Proof of the crime may rest, as it frequently does, on indirect or circumstantial evidence. The existence of a conspiracy may be inferred from the evidence of related facts and circumstances from which it appears as a reasonable and logical inference that the activities of the participants in the criminal venture charged could not have been carried on except as a result of their agreement, preconceived scheme or common understanding.

If you determine beyond a reasonable doubt that this conspiracy charged in each conspiracy count existed, you must then determine whether or not each defendant was a member. One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. However, a person who has no knowledge of a conspiracy but happens to act in a way which furthered some object or purpose of the conspiracy does not thereby become a conspirator. Similarly, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other and together discussed common aims and interests does not necessarily establish proof of a conspiracy. Whether or not any defendant was a member of the conspiracy charged in each conspiracy count must be determined from the evidence that you have heard about his own action, conduct, statements, and declarations, and his own connection with the acts and conduct of other alleged co-conspirators.

You may consider and weigh the acts and declarations of other alleged co-conspirators in evaluating whether a defendant's actions and statements show him to be a member of the conspiracy. In short, whether or not a defendant was a member of the conspiracy may be deter-

mined from all the evidence in the case, including all reasonable inferences that you draw from that evidence.

There must be knowing and willful participation in the conspiracy by each defendant. If a defendant, or any other person, with an understanding of the unlawful character of a plan, knowingly acts by encouragement, advice, or assistance for the purpose of furthering the undertaking or scheme, he thereby becomes a willful participant, a conspirator. A conspirator need not become a member of the illegal agreement at the beginning of the conspiracy. Once a defendant joins the conspiracy, however, he effectively adopts all previous acts and declarations of his fellow conspirators, whether he knows of them or not, because one who willfully joins an existing conspiracy is charged with the same responsibility for its acts as if he had been one of the originators or instigators of the conspiracy.

The conspiracy counts of the indictment charge, and the Government must prove, that the defendants, knowingly and willfully violated the law. "Knowingly" means with knowledge, that is, voluntarily and intentionally and not because of mistake or accident or other innocent reason. An act is done willfully is done voluntarily and intentionally with a specific intent to fail to do what the law requires, that is to say with a purpose either to disobey or disregard the law.

In determining whether a defendant has acted knowingly and willfully, it is not necessary for the Government to establish that he knew he was breaking any particular law. Ignorance of the law is no excuse. Willful intent may be evidenced not only by statements that are patently false, but by false and untrue statements made with reckless indifference as to whether they are true or false.

Knowledge and intent exist in the mind. Since it is not possible to look into a person's mind to see what went on, the only way you have to arrive at a decision on these questions is for you to take into consideration all the facts and circumstances shown by the evidence, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances. So if a defendant or any other person with understanding of the unlawful character of the plan knowingly encourages, advises, or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a willful participant, a conspirator. When people enter into a conspiracy to accomplish an unlawful end, they become agents for one another in carrying out the conspiracy. Hence, the acts and declarations of one knowingly made in the course of the conspiracy and in furtherance of the common purpose are deemed to be the acts of all, and all are responsible for such acts and statements.

Accordingly, if, from the evidence in the case, you find beyond a reasonable doubt that a conspiracy existed, and that a defendant or other person was a member of the conspiracy, then any statements knowingly made and any acts knowingly performed by that person may be considered as evidence against any other defendant who you also find to have been a member of the conspiracy. Thus, even if a defendant was not present when a statement was made or an act performed by another co-conspirator, you may still properly consider it as evidence against him, if the statement or act was knowingly made or performed

during the continuance of the conspiracy and in furtherance of the conspiracy or that were made before it began or after it ended may be considered as evidence only against the person making them.

The guilt of an individual conspirator is not determined by the extent or scope of his participation. A defendant may be convicted as a conspirator even though he may have played only a minor part in this conspiracy. Some conspirators may play larger roles than others. However, that does not affect the determination of guilt or innocence. The Government need not prove that a defendant knew the exact function of each and every other conspirator to establish that there was a mutual understanding or agreement. As I have said, a conspiracy is a combination or agreement, mutual understanding, if you will, by two or more persons to accomplish a criminal or unlawful purpose or a lawful purpose by unlawful means. The very essence of conspiracy is a unity of purpose or of common design.

A person is to be considered a conspirator if the evidence establishes, beyond a reasonable doubt, that he was a member of the conspiracy. A conspirator need not be a defendant in this case.

In order to find a defendant guilty of conspiracy in Counts 1 and 4, you must also find beyond a reasonable doubt that one or more overt acts were committed in furtherance of the conspiracy by one or more persons you find to be members of the conspiracy. An overt act is an act knowingly committed by one of the conspirators in an effort to effect, achieve, or accomplish some object or purpose of the conspiracy. The act itself need not be criminal in nature if considered separately and apart from

the conspiracy. It may be as innocent on its fact as the act of meeting, writing a letter, depositing a check, or talking on the telephone. However, it must be an act that follows and tends toward the accomplishment of the plan or scheme, and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

In determining whether an over act was committed, it does not matter that it is alleged to have occurred on or about a specific date. It is sufficient if you find that it occurred on or about the date in the indictment, or that it occurred within the conspiracy period.

The United States does not have to establish all of the overt acts set forth in the indictment. Indeed, if you find that just one overt act, whether specifically enumerated under Counts 1 or 4 or not was committed by any co-conspirator in furtherance of the conspiracy, then the requirement that the United States establish an overt act has been satisfied as to each member of the conspiracy.

The indictment alleges in Count 1 that the conspiracy existed from as early as 1982 and continued until February 11th, 1987, the date of the indictment. The indictment in Count 4 charges that the conspiracy existed from at least March 26th, 1985 up to and through February 11th, 1987, the date of the indictment. As I mentioned earlier, it is not essential that the United States prove that the conspiracy started and ended on and about those exact dates or that the conspiracy continued during the entire time alleged. It is sufficient if you find that the conspiracy existed at any point in time within the period set forth in the indictment, and that one of the over acts, as alleged, occurred within that period.

In addition, a conspiracy once formed is presumed to have continued until its objectives are accomplished or there is an affirmative act of termination by its members or it is otherwise terminated as, for example, by arrest. So too, once a person is found to be a member of a conspiracy, he is presumed to continue his membership until its termination unless there is affirmative proof offered of withdrawal or disassociation.

If you find that a conspiracy exists here, each defendant was an agent of the other conspirators during the lifetime of the conspiracy until the object of the conspiracy was consummated, what one did, assuming you had found him to be a member of the conspiracy, bound the others by virtue of their common venture.

Thus, to sum up, in order to find the defendant guilty of the conspiracies charged in each of the conspiracy counts of the indictment, you must conclude beyond a reasonable doubt that the conspiracy existed as charged at or about the time alleged, and that the defendant willfully became a member of the conspiracy. The specific offense against the United States that is charged as the object of the conspiracy in Count 1 is described in Title 18 of the U.S. Code, Section 1341. That statute provides that: "Whoever having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, for the purpose of executing such scheme or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever, to be send to delivered by the U.S. Postal Service, is guilty of an offense against the United States."

In this case, the indictment charges that the defendants and others conspired or agreed to commit mail fraud by

agreeing to devise a scheme to defraud the City of New Brunswick and to obtain money by means of false pretenses, and that they used or caused to be used the U.S. mails to execute their scheme. It also charges that one or more members of the conspiracy committed any one of a number of overt acts to accomplish some goal or purpose of the conspiracy.

I will now explain certain of the terms I have just used as they apply to Count 1. The words "scheme" and "artifice," as used in the mail statute, include any plan or course of action intended to deceive others or to obtain by false or fraudulent pretenses, representations or promises, money or property rights from persons so deceived. In this case, the indictment charges that the defendants schemed to obtain money and property by means of false and fraudulent pretenses.

The indictment further charges that the defendants schemed to defraud the citizens and taxpayers of New Brunswick of their right to the honest and loyal services of their public officials and of their right to have the business and affairs of the City of New Brunswick conducted honestly and free from fraud, corruption, and conflict of interests.

I instruct you that intangible rights such as the right of citizens to honest services by officials can be a target of a scheme to defraud.

A statement or representation is false or fraudulent within the meaning of the statue, if known to be untrue or made with reckless indifference as to its truth or falsity and made or caused to be made with the intent to deceive. A false or fraudulent representation may be made by statements of half-truths. A false or fraudulent repre-

sentation may also be made by the deliberate concealment of material facts, as well as by affirmative statements or acts.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive, ordinarily for the purpose of either causing some financial loss to another or bringing about some financial gain to oneself.

As I have charged you, a fraudulent intent is necessary to sustain the charge of a scheme to defraud. A false statement or representation amounts to fraud if the defendant made the statement or representation with the intent to defraud, and either knew it to be false or acted in reckless disregard of its truth or falsity.

The amount of money lost by any alleged victim is irrelevant to the question of whether there was a conspiracy to devise a scheme or artifice to defraud. Indeed, the United States is not required to prove that any person, entity, or public body lost any money. The gist of the offense charged in the indictment is conspiring or agreeing to participate in a scheme to defraud in which the use of the mails in furtherance of the scheme by a co-conspirator is reasonably foreseeable. So the success or failure of the scheme is immaterial and it is not necessary to show that any person was in fact defrauded.

Conversely, you need not find that a defendant made any money in order to find him guilty. Thus, failure of a defendant to profit financially from the conspiracy should not affect the determination of his guilt or innocence.

Use of the U.S. mails in furtherance of a scheme to defraud is not an essential element of conspiracy to violate the mail fraud statute. In other words, one can conspire to violate the mail fraud statute without actually mailing a

letter. It is sufficient if the use of the mails by a participant in furtherance of the scheme was a reasonably foreseeable part of the scheme, or if acts were contemplated with the knowledge that use of the mails would follow in the ordinary course of business.

Furthermore, the particular foreseeable use of the mails may be entirely innocent. It need not contain any misrepresentations or disclose any fraudulent purpose or show on its face that it was in furtherance of any scheme or artifice to defraud. The mailing need only advance the scheme to defraud the City of New Brunswick for you to find a defendant guilty of a conspiracy to violate the mail fraud statute, if you find that each of the other elements has been proved by the Government beyond a reasonable doubt.

Count 2 charges a violation of the federal extortion statute called the "Hobbs Act," which is Title 18, United States Code, Section 1951. In short, this statute prohibits obstructing, delaying, or affecting interstate commerce by extortion, as the term "extortion" is specifically defined, or conspiracy to do so.

Thus, the statute states that: "Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by extortion or attempts to conspire to do so, shall be guilty of an offense against the United States." The term "commerce" means all commerce between any point in the state and any point outside thereof. The term "extortion," as relevant here, means the obtaining of property from another under color of official right. The term "property," of course, includes money and other things of value such as ownership or partnership interests in property.

Now, Count 2 charges defendants Nelson and Gassaro with a Hobbs Act violation by virtue of a conspiracy to extort Richard Malouf of money and ownership interests in property he was selling to the City of New Brunswick. Count 3 charges that same defendants with the substantive violation of the Hobbs Act relating to the successful involvement of the charged defendants in the ownership of that property.

With respect to Count 2, ladies and gentlemen, a conspiracy, as I have told you, is nothing more than an agreement by two or more persons to accomplish a criminal act or unlawful objective or to accomplish a lawful purpose by unlawful means. Count 2 charges that the defendants conspired with each other and others to obstruct commerce by extortion. It charges specifically that it was part of the conspiracy that defendants would obtain property of Richard Malouf, to wit, money and property interests with the consent of Richard Malouf, such consent to be induced under color of official right.

I have already advised you of the general principles of law that govern conspiracy. These same general principles apply to the conspiracy charged in Count 2. The only difference is that the conspiracies charged in Count 1 and 4, in addition to finding that each defendant fulfilled each element of the offense, you must also find that one of the the [sic] conspirators committed an overt act in furtherance of the conspiracy. In Count 2 you need not find that any overt act was committed to find the defendant guilty of Hobbs Act conspiracy.

Now, the crime of conspiracy is a separate and distinct offense from the other substantive counts charged in the indictment. A conspiracy is something apart from and in-

dependent of the substantive evidence which is the unlawful object of the conspiracy. The essence of the crime of conspiracy is the unlawful agreement among the parties to commit an offense against the United States. Here the alleged agreement to extort Malouf of money or ownership interests in his property, which agreement, if acted upon, would obstruct commerce by extortion.

Count 3 charges a Hobbs Act violation by an extortion relating to the purchase and sale of the Malouf property.

Now, there are certain essential elements which must be proved beyond a reasonable doubt in order to establish the offense of extortion as charged in Count 3.

First, that the defendant was a public official or held public office;

second, that the defendant knowingly and willfully obtained a property described in the indictment;

third, that the defendant obtained the property by extortion; that is, he obtained the property under color of official right, that is because of his official position;

and fourth, that as a result, interstate commerce was delayed, interrupted, or affected.

With respect to the extortion charged in Counts 2 and 3, extortion under color of official right is the wrongful taking by a public officer of money or property not due him or his office, whether or not the taking was accomplished by threats or use of fear. In other words, the wrongful use of otherwise valid official power may convert such an action into extortion.

In order to establish extortion under color of official right, the Government is not required to prove that the defendant or anyone else initiated or induced the scheme

by soliciting money or property from the person, and the extortion alleged need not involve any threat, fear, or duress. If a person feels reasonably compelled to pay money or to provide other property to a public officer not due or owing to the official office of that public officer; that is, if he feels reasonably compelled to pay because of that officer's wrongful use of his official position, wrongfully used for the purposes of obtaining money or other interests, the requirements of the crime of extortion under color of official right are satisfied. This is true even if the official is already duty bound to take or withhold the official act in question. So long as the motivation for payment of money or interest by the person focuses on his concern over the public official's use of his office, the conduct violates the Hobbs Act.

Stated differently, the Government is required to prove that a public official obtained money or other property to which he was not entitled, and which he obtained because of his official position.

You may find extortion under color of official right present even if the defendant had no actual or official authority to act. The fact that a payment or property was obtained because of the exploitation by the defendant of a person's reasonable belief that a defendant possessed effective power to cause official action, even though he lacked actual official authority to cause that action, is sufficient.

Now, I have referred in Counts 2 and 3 to the term "interstate commerce." Interstate commerce means the flow of commerce or business activities between two or more states. It is not necessary to prove that the defendants specifically intended to interfere with interstate com-

merce. All that is necessary to prove this element is that the natural consequences of the acts alleged in the indictment would or did delay, interrupt, or adversely affect interstate commerce in any way or degree, whether harmful or not. With respect to this element, I instruct you — and it is stipulated, is it not, counsel?

MISS FLEMING: Yes, Judge.

THE COURT: And it is stipulated that the City of New Brunswick issued, advertised, or sold, and/or insured bonds out of the State to cover the cost of appropriating and renovating the Malouf property pursuant to the City's ordinance as more specifically described in the indictment, and thus, as a matter of law, the Government has sustained its burden of proving that the transaction delayed, interrupted, or adversely affected interstate commerce.

With regard to the element of obstructing, delaying, or affecting interstate commerce, it is not necessary for you to find that the defendants intended to affect interstate commerce. In other words, it need not be shown that the purpose of the alleged extortion was to affect interstate commerce, but only that one of the natural effects thereof be an obstruction of or an affect on that commerce.

Now, Counts 1, 3, 4, and 5 also charge violations of Title 18, U.S. Code, Section 2, the aiding a abetting statute. Guilt of a defendant in a criminal case may be established without proof that he personally did every act constituting the offense alleged. The law recognizes that ordinarily anything a person can do for himself may also be accomplished by him through direction of another person as his agent, or by acting in concert with or under the direction of another person or persons in a joint effort or enterprise.

Therefore, Title 18, Section 2, provides: "Whoever commits an offense against the United States, or aids and abets, counsels, commands, induces, or procures its commission is punishable as a principal." Whoever causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal. Thus, any person who knowingly aids or abets or procures the commission of a crime is guilty of that crime. Of course, that person must knowingly associate himself with the criminal venture, participate in it, and try to make it succeed. In other words, every person who willfully participates in the commission of a crime may be found guilty of that offense. In order to aid and abet another to commit that crime, it is necessary that the accused willfully associate himself in someway with the criminal venture and willfully participate in it as he would in something he wishes to bring about. That is to say that he willfully seeks, by some act or omission, to make the criminal venture succeed. While there is no precise rule, it is enough that a defendant in some way associate himself with the criminal venture, and that he seek by his action to make it succeed.

You may, of course, not find any defendant guilty of aiding and abetting unless you find beyond a reasonable doubt that every element of the offense, as defined in these instructions, was committed by some person or persons and that the defendant participated in the commission.

In summary then, the actual commission of an substantive offense and the criminal conspiracy to commit that substantive offense are two separate and distinct crimes. Furthermore, an offense may be committed either by the

direct personal commission of all of the acts making up the offense or by aid and abetting the commission of the offense.

Count 4 of the indictment charges that the defendants Gilbert Nelson and George Shamy conspired or agreed to influence, obstruct, impede and to endeavor to influence, obstruct, and impede the due administration of justice in violation of Title 18, United States Code, Section 371. Once again, that section provides in part that: "If two or more persons conspire to commit any offense against the United States, and one or more of such persons do any act to effect the object of the conspiracy, those persons are guilty of an offense against the United States."

Before you may convict a defendant of the conspiracy charged in this count, you must find beyond a reasonable doubt that the conspiracy described in the count was voluntarily and intentionally formed; and was existing at or about the time charged; that the defendant knowingly and willfully became a member of the conspiracy; and that a member of the conspiracy thereafter knowingly committed one of the overt acts with the purpose of furthering an object of the conspiracy as charged.

I remind you that the burden is upon the United States to prove each and every element of the offense charged, and that the law never imposes any burden upon a defendant to call any witnesses or produce any evidence. As before, with respect to this conspiracy, and except as you may be specifically instructed as to the other elements, you are to consider my earlier instructions with respect to the law of conspiracy including the element of an overt act.

Now, the specific offense against the United States that is charged as an object of the conspiracy in Count 4 is

described at 18, U.S. Code, Section 1503. That section reads as follows:

"Whoever corruptly influences, obstructs, or impedes or endeavors to influence or obstruct or impede the due administration of justice," is guilty of an offense against the United States.

In this case the indictment charges that defendants Nelson and Shamy, and others, conspired or agreed to obstruct the due administration of justice in a specific case, by means of altering and fabricating documents which they misrepresented and produced to federal law enforcement agencies for production to the federal grand jury sitting in Newark, during the course of an investigation into the events surrounding the City of New Brunswick 1983 purchase of the Malouf property. It also charges that one or more members of the conspiracy committed one or more of a number of overt acts intended to accomplish some goal or purpose of the conspirators.

I will explain certain of the terms I have just used as they apply to Count 4 as well as Counts 5 and 6 of the indictment.

The term "due administration of justice" refers to the fair, impartial, uncorrupted and unimpeded investigation, prosecution or trial of any matter pending in the courts of the United States. It includes every step in a criminal matter or proceeding in the federal courts. Thus, due administration of justice includes, but is not limited to, pending grand jury proceedings or investigation. A grand jury proceeding is pending, even though the grand jury has not actually heard testimony, and even though the grand jury did not play a role in the decision to issue a subpoena, as long as that subpoena was issued in further-

ance of an actual grand jury investigation, that is, to secure a presently contemplated presentation of evidence before the grand jury.

To "endeavor to obstruct justice" means to take some intentional effort, or take any act however contrived, to obstruct, impede, or interfere with a grand jury proceeding. It is the "endeavor" which is the gist of the crime. Success of the endeavor is not an element of the crime. Any effort, whether successful or not, that is made for the purpose of corrupting, obstructing, or impeding a proceeding is condemned.

The "obstructing," as used in the statute, means simply having the improper motive or purpose of obstructing justice.

The indictment also charges in Count 4 that the defendants conspired to obstruct justice by several means, specifically by:

(1) causing a closing document to be altered and reflect falsely that $5,000 had been paid to defendant Shamy; and further, by causing the closing statement to be produced to federal law enforcement agencies;

(2) by defendant Nelson's causing the New Brunswick City Tax Collector to change the books and records of the City of New Brunswick;

(3) by defendant Shamy's fabricating the April 16th, 1983 letter and misrepresenting its origins to members of the grand jury and representatives of law enforcement agencies; and further, by defendant Nelson producing a letter to representatives of federal law enforcement agencies for production to the grand jury during the course of its investigation;

and (4) by defendant Shamy's appearing and testifying falsely before the grand jury.

It is not necessary in Count 4 that the United States prove that the defendants succeeded in obstructing justice by any of these means. Nor is it necessary that the United States prove that the conspirators used all of the means that are charged in the indictment. It is sufficient if the United States proves, beyond a reasonable doubt, that the conspirators knowingly and intentionally agreed to endeavor to try to obstruct justice by one of the means charged, and that one or more of the conspirators thereafter undertook some specific overt act charged in the indictment with the intent to accomplish this unlawful goal.

With regard to Count 4, it is also not necessary that the United States prove that a grand jury proceeding was pending at all times when defendants conspired to obstruct justice. It is sufficient if the United States proves defendants entered into such a conspiracy expecting that judicial proceedings would be instituted in the future and committed an overt act in furtherance of the conspiracy after grand jury proceedings began.

Count 5 of the indictment charges defendants Nelson and Shamy with the substantive crime of obstruction of justice and in violation of Title 18, United States Code, Section 1503.

Count 6 charges defendant Nelson with obstruction of justice under the same statute. Once again, that statute reads in part that: "Whoever corruptly influences, obstructs or impedes, or endeavors to influence, obstruct or impede the due administration of justice is guilty of an offense against the United States."

In essence, Count 5 charges that while a grand jury was investigating the violations of law alleged in Counts 1 through 3, the defendants, with the specific intent to im-

pede the administration of justice, caused the April 16th, 1983 letter authored by defendant Shamy to be produced to federal law enforcement officials pursuant to grand jury subpoena.

Count 6 in essence charges that defendant Nelson caused an altered closing document to be produced to federal law enforcement officials during the course of the grand jury's investigation.

There are three essential elements which the Government must prove beyond a reasonable doubt to establish the offenses charged in Counts 5 and 6.

First, that at or about the time charged in the indictment, that is, on or about May 7th, 1985, a federal grand jury duly empanelled in this district was conducting an inquiry into alleged violations of the laws of the United States;

Second, that the defendant knew that such a proceeding was in progress;

Third, that the defendant did corruptly influence, obstruct or impede, or endeavor to influence, obstruct, or impede the proceeding.

The first element the Government must prove beyond a reasonable doubt is that a grand jury duly empanelled in this district was conducting an inquiry into alleged violations of the laws of the United States. As I mentioned a few moments ago, a grand jury proceeding is pending for the purposes of this statute if an Assistant U.S. Attorney has issued a subpoena in furtherance of the grand jury investigation, even if the grand jurors have not heard testimony or taken a role in the decision to issue the subpoena.

The second element the Government must prove beyond a reasonable doubt is that the defendant knew that

such a proceeding was in progress. In order to satisfy this element, you need only determine that the defendant knew on or about May 7th, 1985, the date charged in the indictment, that a grand jury proceeding was in progress. In this regard you may consider all the surrounding circumstances of the alleged obstruction as well as circumstantial evidence.

The final element the Government must prove beyond a reasonable doubt is that the defendants did corruptly obstruct or impede or endeavor to obstruct or impede the proceeding. As I explained earlier, the word "corruptly" means simply having the improper motive or purpose of obstructing justice. As I told you also, success of the endeavor is not an element of the crime. The term "endeavor" is designed to reach all conduct which is aimed at influencing and impeding grand jurors. Thus, it is sufficient to satisfy this element if you find that the defendant made any effort or did any act for the purpose of obstructing or impeding the proceeding.

Now, you will note that the substantive count, that is Counts 3 and 5, charges that an offense was committed between, in or about certain dates. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on dates reasonably near the dates alleged.

A few more brief instructions and I will be finished. The question of punishment is not to enter into your deliberations. This is a function for this court. Your only concern is to determine guilt or innocence. You make that determination by weighing the evidence, drawing the inferences which you find to be warranted, and finding

the facts to which you apply the law as I give it to you in these instructions. A consideration of the type or extent of any penalties that may or may not be imposed has no place in that process. You are not to be swayed or influenced or concerned in any way by the question of any punishment that may be imposed.

Now, in respect to your verdict, the verdict must represent the considered judgment of each juror. In order to return a verdict in this matter, it is necessary that each juror agree thereto. You should go through each count separately and as to each count your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching agreement, if you can do so without doing violence to our individual judgments. Each of you must decide the case for him or herself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors.

In the course of your deliberation, do not hesitate to reconsider your own views and change you opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. Remember at all times, you are not partisans, you are judges, judges of the facts.

You may have noticed whenever you entered the courtroom and whenever you left the courtroom everyone stood, including myself. We do that for an important reason, and that is to convey to you that you are, indeed judges in this courtroom, and we, therefore, accord you the respect to which you are entitled. Your sole interest is to seek the truth from the evidence in the case.

I will send into the jury room the exhibits which have been received in evidence, and you will have the opportu-

nity to review them during the course of your deliberations. I will also send in a verdict sheet which you must complete when you have reached a verdict. The verdict sheet simply tracks the counts of the indictment and is, I believe, self-explanatory.

If it should become necessary to communicate with the court at any time during your deliberations, there will be a marshal outside the door of your room. You should communicate with the court only by written note, and the note can be signed by the foreperson or by one or more jurors. But the court will not communicate with you except in writing or here in open court in the presence of counsel and the defendants.

You will also note from the oath about to be taken by the marshal that he as well as all other persons are not permitted to have any discussions with you about anything which may pertain to this case. And I must also caution you to please bear in mind that at no time are you ever to reveal to the court, or anyone, how you stand numerically or otherwise on the question of guilt or innocence until you have reached a verdict. In other words, the court is never to be advised how you stand numerically until that moment comes. I remind you that you have to be unanimous.

I would suggest that the first thing you do when you go into the jury room is to select a foreperson. It's a new word we use now. How you do that and how you vote we leave entirely up to you. If you want to do it by show of hands or if you want to do it by paper ballot or any other way you decide, that is perfectly appropriate.

When you have reached a unanimous verdict, you should advise the marshal or the court officer outside of

the door that you have done so and he will report that fact back to me. After you have been ushered back to your seats in the jury box, you will answer the questions put either by me or by my Deputy Clerk to you regarding your verdict, and you will make known your verdict through your foreperson. The foreperson will simply be called upon to respond as to each defendant on each count, guilty or not guilty.

Counsel to side bar.

(Side bar discussion).

THE COURT: All right. Are there any objections to the charge?

MR. BLIABLIAS: None other than those previously expressed, Judge.

MR. QUERQUES: Same here.

MR. RUOTOLO: Forgive me. I do. My word "only" did not get in there. I just want —

THE COURT: Yes, I said that.

MR. QUERQUES: I thought we made that we're just saying again.

MR. RUOTOLO: No, it didn't make it.

THE COURT: Anything else?

MISS FLEMING: No, Judge.

(End of side bar).

THE COURT: All right. Now, ladies and gentlemen, comes that moment when two of you will leave us. As I told you in the beginning. We select our alternates following deliberation and following the charge to the jury and prior to deliberations.

Miss Costello will call two names. Those two persons will serve as alternates, in effect, being discharged. What I would ask is that you do, those two of you, is to retrieve

your possessions from the jury room. You can say goodbye to your fellow jurors, but do not in any way communicate anything about the case or any views you may have. I would like to see you in my chambers merely to thank you for your service and to excuse you.

Would you call two names, please, Miss Costello?

THE CLERK: Mary Chawlk.

THE COURT: You can stay there for now.

THE CLERK: Patricia McCoy — oh, Patricia McCoy, I'm sorry.

THE COURT: Miss Chawlk, Miss McCoy — oh, yes. Oh, I know who you are. Just going to tell you to just sit tight.

Would you swear the marshal, please, Miss Costello.

(Marshal sworn).

THE COURT: Ladies and gentlemen, those of you who will serve as jurors in this matter will retire to the jury room in just a moment. I am going to leave it to you how long you choose to stay this evening. You may say you want to get started and, indeed, you may say you want to continue through the evening. If so, it would be our pleasure to accommodate you, and I will make certain that you have dinner provided to you. You may say we don't want to stay that long. That will be your decision. And I will await your advice by note. So you'll get into the jury room, you'll decide what you want to do this evening. I tell you, we're more than happy to stay as late as you wish us to. We are to your service.

That having been said, the jury may retire. We will have the exhibits brought into the jury room together with the indictment and together with the verdict sheet.

All rise.

(Jury exits).

THE COURT: All right. Will you be around?

MISS FLEMING: We have to go through the evidence, Judge.

THE COURT: Yes. Okay.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,
Plaintiff

vs.

GILBERT NELSON, JAMES V. GASSARO,
JOSEPH PERRONE and GEORGE SHAMY,
Defendants

Criminal Action
No. 87-41

ORDER

This matter having come before the court on the application of defendants Gilbert Nelson and James Gassaro for a judgment of acquittal with respect to Counts 2 and 3 of the Indictment, pursuant to Rule 29 of the Federal Rules of Criminal Procedure

It is on this 3rd day of August, 1987,

ORDERED that for the reasons stated in this court's opinion dated August 3rd, 1987, defendants motion is granted and Counts 2 and 3 are dismissed.

s/ MARYANNE TRUMP BARRY
U.S.D.J.